

COMMENTS

*Boeing Co. v. Aetna Casualty & Surety Co.*¹ CERCLA Response Costs Covered "As Damages" Under Comprehensive General Liability Insurance Policies

I. INTRODUCTION

In 1983, the Environmental Protection Agency (EPA) determined that the groundwater and the aquifer at the Western Processing Facility² in Kent, Washington, contained hazardous waste contamination.³ Pursuant to federal Superfund legislation,⁴ the EPA performed an emergency cleanup of the contaminated site. Subsequently, the EPA identified the Boeing Company,⁵ among others,⁶ as both a generator and a trans-

1. 113 Wash. 2d 869, 784 P.2d 507 (1990).

2. The Western Processing Facility is a toxic dump site. Since the 1960s, three hundred companies have dumped approximately twenty-three million gallons of waste at the site. *PUGET SOUND BUS. J.*, Mar. 30, 1987, § 1, at 17. Western Processing recycled this hazardous waste for resale.

3. The Western Processing Facility, as well as the property adjoining the facility, contained a "witch's cauldron" of ninety of the 129 "priority" contaminants listed by the EPA as hazardous substances, including benzene, chloroform, arsenic, chromium, lead, cadmium, mercury, zinc, cyanide, PCBs, and pesticides. *PUGET SOUND BUS. J.*, Jan. 26, 1987, 1, at 1. Hazardous waste at Western Processing contaminates the soil to a depth of sixty feet. *Id.* In 1983, Western Processing ranked forty-third out of the four hundred sites listed by the EPA as the nation's most polluted sites. *Id.* at 2. Western Processing is one of the top 10 sites on the federal Superfund list of hazardous waste sites. *Seattle Times*, Feb. 23, 1990, at F4, col. 2. The estimated costs to clean up the hazardous waste contamination at Western Processing and Queen City Farms, a hazardous waste site also located in Kent, Washington, exceeds \$100 million. *Business Insurance*, October 1, 1990, at 1. *See also* *Boeing Co. v. Aetna Casualty and Sur. Co.*, 113 Wash. 2d 869, 784 P.2d 507 (1990).

4. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified at 42 U.S.C. § 9601-9657 (1988)), as reauthorized and amended in part by Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified at scattered sections as 42 U.S.C. § 9601-9675 (1988)) [hereinafter CERCLA].

5. *Boeing*, 113 Wash. 2d 869, 784 P.2d 507. Between 1964 and 1978, Boeing is estimated to have dumped twenty-four million gallons of toxic waste at two facilities: Western Processing and Queen City Farms, both in Kent, Washington. *Seattle Times*, Sept. 22, 1990, at A1, col. 1. Each year, Boeing generates 8.5 million gallons of toxic

porter of the hazardous waste that contaminated and continues to contaminate the site. Boeing reimbursed the EPA for the clean-up costs that the agency incurred and then sought indemnification from Aetna and its other insurers.

When the insurers refused to indemnify the company, Boeing brought an action seeking indemnification for pollution-related expenses under the comprehensive general liability (CGL) policy.⁷ The insurers defended the action by arguing that the reimbursement of clean-up costs paid to the EPA did not constitute damages within the meaning of the CGL policies;⁸ therefore, according to the insurers, Boeing was not entitled to indemnification.

In the landmark decision of *Boeing Co. v. Aetna Casualty and Surety Co.*, the Washington State Supreme Court determined that, under the terms of the CGL policies, the insurers must reimburse Boeing for the expenses that the company paid and will continue to pay to the EPA as a result of the agency's ongoing cleanup of Western Processing.⁹ This decision marked the first time in which a state supreme court has found Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)¹⁰ clean-up costs to be covered damages under CGL policies and, as such, sets an important precedent.¹¹ Moreover, the *Boeing* decision is a watershed for state supreme court decisions; other state supreme courts are adopting a similar analysis, rejecting the reasoning of related

waste, most of which is produced as a by-product from chemicals used to coat the outside of airplanes. *Seattle Times*, Aug. 22, 1990, at D2, col. 1.

6. Other policyholders participating as plaintiffs in the *Boeing* case included: RSR Corporation, Northwest Steel Rolling Mills, Inc., Davis Walker Corporation, and John Fluke Manufacturing Company, Inc. *Boeing*, 113 Wash. 2d at 869-70, 784 P.2d at 507.

7. See *infra* note 61 and accompanying text.

8. *Boeing*, 113 Wash. 2d at 875-76, 784 P.2d at 510.

9. *Id.* at 888, 784 P.2d at 516.

10. CERCLA, *supra* note 4.

11. Since the court's decision in *Boeing*, five other state supreme courts have ruled on the issue of whether clean-up costs are damages within the terms of a CGL policy: *AIU Ins. Co. v. Superior Court (FMC Corp.)*, 51 Cal.3d 807, 274 Cal. Rptr. 820, 799 P.2d 1253 (1990) (because the CGL policies did not define "damages," the term will be given its ordinary and popular meaning); *Hazen Paper Co. v. United States Fidelity & Guar. Co.*, 555 N.E.2d 576 (Mass. 1990) (finding that the state appellate courts that have addressed the "as damages" issue have found CERCLA clean-up costs to be covered damages); *Minnesota Mining & Mfg. Co. v. Travelers Indem. Co.*, 457 N.W.2d 175 (Minn. 1990) (under Minnesota contract law, the term "damages" is ambiguous and should be interpreted in favor of the insured); *C.D. Spangler Const. Co. v. Industrial Crankshaft and Eng'g Co.*, 326 N.C. 133, 388 S.E.2d 557 (1990) (concluding "damages" is not used in a legal and technical sense within CGL policies). *Contra* *Patrons Oxford Mut. Ins. Co. v. Marois*, 573 A.2d 16 (Me. 1990) (clean-up costs are not damages).

federal court decisions and deciding the issues based on state contract law.¹²

The *Boeing* decision represents a typical case in the midst of a recent explosion in environmental litigation. This explosion is largely attributable to increased public awareness of environmental hazards and the dangers posed by toxic waste pollution.¹³ In 1980, Congress addressed the growing national concern over destruction of the environment and the danger to human health caused by abandoned and improperly managed toxic waste dumps by enacting CERCLA. CERCLA, popularly known as "Superfund," was enacted specifically to finance the cleanup of inactive hazardous waste sites and to provide recovery for injury to the environment.¹⁴ Moreover, CERCLA entitles federal and state governments to recover costs incurred in the cleanup of hazardous waste sites from persons¹⁵ responsi-

12. The court in *Boeing* rejected the district court's opinion in *Travelers Ins. Co. v. Ross Elec. of Washington, Inc.*, 685 F. Supp. 742 (W.D. Wash. 1988) (applying Washington law). See also *Minnesota Mining & Mfg. Co. v. Travelers Indem. Co.*, 457 N.W.2d 175 (Minn. 1990) (finding in favor of coverage and rejecting Continental Ins. Cos. v. Northeastern Pharmaceutical & Chem. Co., 842 F.2d 977 (8th Cir.) (en banc), cert. denied, 488 U.S. 821 (1988)); *C.D. Spangler Constr. Co. v. Industrial Crankshaft and Eng'g Co.*, 326 N.C. 133, 388 S.E.2d 557 (1990) (finding CERCLA clean-up costs to be damages and rejecting *Maryland Casualty Co. v. Armco, Inc.*, 822 F.2d 1348 (4th Cir. 1987), cert. denied, 484 U.S. 1008 (1988)).

13. *Broadwell Realty Services, Inc. v. Fidelity & Casualty Co.*, 218 N.J. Super. 516, 522-23, 528 A.2d 76, 79 (1987).

Each year, millions of gallons of hazardous waste are stored, recycled, or dumped. *Avondale Indus. Inc. v. Travelers Indem. Co.*, 887 F.2d 1200, 1201 (2nd Cir. 1989), cert. denied, 110 S. Ct. 2588 (1990). Eventually, the toxic material seeps into lakes, streams, and underground water. *Id.* Exposure to hazardous waste can cause serious health problems, including cancer, birth defects, miscarriages, and damage to the lungs, liver, and nervous system. *Developments in the Law: Toxic Waste Litigation*, 99 HARV. L. REV. 1462, 1462 (1986).

Public awareness of the dangers of hazardous waste pollution increased after the discovery of the contamination of Love Canal. At Love Canal, New York, between the late 1920s and early 1950s, a partially dug canal was used as a dumping site for municipal wastes and for chemical wastes generated by Hooker Chemical Co. Baurer, *Love Canal: Common Law Approaches to a Modern Tragedy*, 11 ENVTL. L. 133, 135 (1980). In 1976, chemical leachates began seeping into basements of homes built on the excavation site. *Id.* at 136. The pollution at Love Canal resulted in 900 damage claims exceeding \$2.5 billion for personal injuries, wrongful deaths, and diminished real estate values. *Mervack v. City of Niagara Falls*, 101 Misc. 2d 68, 69, 420 N.Y.S.2d 687, 689 (1979).

14. Congress intended for the Superfund established by CERCLA to cover the costs of cleaning up hazardous waste and damage to natural resources resulting from hazardous waste releases. 42 U.S.C. § 9604 (1982).

15. CERCLA defines person as "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body." 42 U.S.C. § 9601(21).

ble for the pollution.¹⁶

Polluters, faced with potential liability for the devastating costs¹⁷ of hazardous waste cleanup, have sought indemnification under standard business insurance policies such as the comprehensive general liability policy. When a polluter files a claim for coverage under its CGL policy for reimbursement of clean-up costs paid to the EPA, the insurer may agree to indemnify the insured or it may deny coverage on one of several grounds.¹⁸ Generally, the insurers' first line of defense in contesting coverage is that clean-up costs are not "damages" within the meaning of the CGL policy.¹⁹ Specifically, insurers

16. 42 U.S.C. § 9607(a)(1)-(4).

17. See Lathrop, *Environmental and Toxic Tort Claims From the Insurer's Perspective*, ENVIRONMENTAL AND TOXIC TORT CLAIMS, INSURANCE COVERAGE IN 1989 AND BEYOND 141, 156 (1989). The magnitude of the costs to clean up toxic pollution is exemplified by the cleanup of hazardous waste contamination at the Rocky Mountain Arsenal, near Denver, Colorado. *United States v. Shell Oil Co.*, 605 F. Supp. 1064, 1068 (D. Colo. 1985). As of December, 1983, the United States Army had spent approximately \$48,000,000 to clean up hazardous chemicals polluting the air, land, groundwater, and surface water at the Arsenal. *Id.* Unfortunately, the estimated costs of cleanup far exceed the amount already spent—cleanup estimates range from \$210,000,000 to \$1,860,000,000. *Id.*

18. Before an insurer will pay the polluter, the insurer may invoke any of the following defenses to liability:

(1) Reimbursement for clean-up costs do not constitute "damages" within the terms of the "as damages" clause of the CGL policy;

(2) The pollution does not constitute an "occurrence" under the meaning of the CGL policy;

(3) The pollution exclusion clause in the CGL policy precludes coverage;

(4) Pollution damage does not constitute "property damage" within the meaning of the CGL policy;

(5) Reimbursement for clean-up costs does not constitute a "suit" against the insured within the meaning of the CGL policy.

See Note, *CERCLA Cost Recovery Suits: A Suit Against An Insured For Damages Under A Comprehensive General Liability Policy*, 14 WM. MITCHELL L. REV. 829, 832-33 (1988).

19. The standard coverage provision under a typical CGL policy provides:

The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of

— Coverage A: bodily injury; or

— Coverage B: property damages

to which this insurance applies, caused by an occurrence, and the company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage, even if any of the allegations of the suit are groundless, false or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient, but the company shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of the company's liability has been exhausted by payment of judgments or settlements.

maintain that funds spent to clean up hazardous waste pollution or to comply with mandatory government cleanups constitute an equitable remedy. According to insurers, equitable remedies are not damages that insurers are obligated to pay on behalf of the insured, even though they are "sums which the insured . . . [is] legally obligated to pay as damages."²⁰ Thus, insurers argue, reimbursement for clean-up costs are not covered damages.²¹

Many courts have rejected the insurer's argument and have found CERCLA clean-up costs to be covered damages under the "as damages" clause of CGL policies.²² However,

Intel Corp. v. Hartford Accident & Indem. Co., 692 F. Supp. 1171, 1174 (9th Cir. 1988); see also Mraz v. American Universal Ins. Co., 804 F.2d 1325, 1327 (4th Cir. 1986); Spurgeon, *Determining The Scope of "Bodily Injury or Property Damage" Under the Comprehensive General Liability Policy*, 23 IDAHO L. REV. 379 (1986-87).

20. See *Intel*, 692 F. Supp. at 1174.

21. Note, *supra* note 18, at 846-47.

22. *Avondale Indus., Inc. v. Travelers Indem. Co.*, 887 F.2d 1200 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2588 (1990) (plain meaning of damages corresponds to the reasonable expectations of the ordinary businessman who would not anticipate insurance coverage to be limited to strictly legal damages); *American Motorists Ins. Co. v. Levolor Lorentzen, Inc.*, 879 F.2d 1165 (3rd Cir. 1989) (the average person would not compare legal and equitable remedies to define the scope of "damages"); *National Indem. Co. v. United States Pollution Control, Inc.*, 717 F. Supp. 765 (W.D. Okla. 1989) (because CGL policies do not define damages, the policies do not "affirmatively" limit damages to legal remedies); *Chesapeake Util. Corp. v. American Home Assurance Co.*, 704 F. Supp. 551 (D. Del. 1989) ("damages" did not, as a matter of law, exclude environmental clean-up costs because the technical definition of damages is not the ordinary and accepted meaning of damages to a reasonably prudent lay person); *New York v. Amro Realty Corp.*, 697 F. Supp. 99 (N.D.N.Y. 1988) (meaning of damages is based on reasonable expectations of insured); *Intel Corp. v. Hartford Accident & Indem. Co.*, 692 F. Supp. 1171 (N.D. Cal. 1988) (under California law, government-mandated clean-up costs are "damages" and thus covered under CGL policies); *United States Fidelity & Guar. Co. v. Thomas Solvent Co.*, 683 F. Supp. 1139 (W.D. Mich. 1988) (finding the insurer's contractual analysis and definition of damages to be "hyperperceptual"); *Centennial Ins. Co. v. Lumbermens Mut. Casualty Co.*, 677 F. Supp. 342 (E.D. Pa. 1987) ("most courts" addressing the "as damages" issue have found environmental clean-up costs to be "damages"); *New Castle County v. Hartford Accident & Indem. Co.*, 673 F. Supp. 1359 (D. Del. 1987) (adopting Delaware law under which the terms of an insurance policy are given their "ordinary, usual meaning" in accordance with the reasonable expectations of the insured); *Township of Gloucester v. Maryland Casualty Co.*, 668 F. Supp. 394 (D.N.J. 1987) (clean-up costs are damages under a CGL policy); *Fireman's Fund Ins. Co. v. Ex-Cell-O Corp.*, 662 F. Supp. 71 (E.D. Mich. 1987) (the term "damages" includes money spent in CERCLA clean-up actions); *United States v. Conservation Chem. Co.*, 653 F. Supp. 152 (W.D. Mo. 1986) (recommendation of Special Master adopted by district court that clean-up costs constitute "damages" under CGL policies.); *Aerojet-General Corp. v. San Mateo County Super. Ct.*, 211 Cal. App. 3d 216, 257 Cal. Rptr. 621 (1989), (because the term "damages" could mean either damages at law or in equity; purchasers of CGL policies would reasonably expect to be insured if their negligence caused injury to or loss of the use of another's property); *Hazen Paper Co. v. United States Fidelity & Guar. Co.*, 407 Mass. 689, 555 N.E.2d 576 (1990)

many other courts have adopted the insurers' reasoning that monetary reimbursement of clean-up costs constitutes equitable relief, not legal damages, and thus, does not fall within the "as damages" clause of CGL policies.²³ This division among the courts, both state and federal, not only leads to increased litigation over the issue, but also leaves polluters and insurers uncertain about their future liability for potentially crippling clean-up costs.

To reduce litigation and settle the question of liability on this issue, courts should quash insurers' attempts to avoid liability for pollution-related clean-up expenses insofar as their defenses are based on the "as damages" clause of CGL policies.

(majority of the highest courts of states addressing the "as damages" issue have ruled in favor of coverage); *United States Aviex Co. v. Travelers Ins. Co.*, 125 Mich. App. 579, 336 N.W.2d 838 (1983) (response costs are covered damages); *Minnesota Mining & Mfg. Co. v. Travelers Indem. Co.*, 457 N.W.2d 175 (Minn. 1990) (Minnesota law places little value on the distinctions between legal and equitable remedies; rather, contract law requires ambiguous terms to be interpreted in favor of the insured); *C.D. Spangler Constr. Co. v. Indus. Crankshaft and Eng'g Co., Inc.*, 326 N.C. 133, 388 S.E.2d 557 (1990) (rejecting Fourth Circuit decision in *Armco*, and holding that the "better reasoned" decisions find "damages" to include CERCLA response costs); *Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 340 S.E.2d 374 (1986) (clean-up costs are essentially compensatory damages and thus covered under CGL policies); *CPS Chemical Co. v. Continental Ins. Co.*, 222 N.J. Super. 175, 536 A.2d 311 (1988) (rejecting argument that monetary assessments for environmental cleanup are not "damages"); *Broadwell Realty Serv's, Inc. v. Fidelity & Casualty Co.*, 218 N.J. Super. 516, 528 A.2d 76 (N.J. Super. App. Div. 1987) (coverage is consistent with both the objectively reasonable expectations of the insured and the language of CGL policies); *Aronson Assocs. Inc. v. Pennsylvania Nat'l Mut. Casualty Ins. Co.*, 99 Dauph. 446, 14 Pa. D. & C.2d 1 (1977), *aff'd*, 272 Pa. Super. 606, 422 A.2d 689 (1979); *Boeing Co. v. Aetna Casualty & Sur. Co.*, 113 Wash. 2d 869, 784 P.2d 507 (1990) (under Washington law, the average purchaser of CGL policies would reasonably expect CERCLA clean-up costs to be covered under CGL policies).

23. *Cincinnati Ins. Co. v. Milliken and Co.*, 857 F.2d 979 (4th Cir. 1988) (the term "damages in the insurance context is not ambiguous and means strictly legal damages"); *Continental Ins. Co. v. Northeastern Pharmaceutical & Chem. Co.*, 842 F.2d 977 (8th Cir.), *cert. denied*, 488 U.S. 821 (1988); *Maryland Casualty Co. v. Armco, Inc.*, 822 F.2d 1348 (4th Cir. 1987), *cert. denied*, 484 U.S. 1008 (1988) (reimbursement is restitutionary form of relief and thus not covered damages); *Mraz v. American Universal Ins. Co.*, 804 F.2d 1325 (4th Cir. 1986) (clean-up costs are economic losses but not damages under a CGL policy); *Varlan Ltd. v. John L. Armitage & Co.*, 695 F. Supp. 950 (N.D. Ill. 1988) (CERCLA response costs are not "damages," but restitutional in nature); *Hayes v. Maryland Casualty Co.*, 688 F. Supp. 1513 (N.D. Fla. 1988); *Travelers Ins. Co. v. Ross Elec. of Washington, Inc.*, 685 F. Supp. 742 (W.D. Wash. 1988) (CERCLA clean-up costs are an equitable remedy and thus not covered damages under CGL policies); *Int'l Minerals & Chem. Co. v. Liberty Mut. Ins. Co.*, 168 Ill. App. 3d 361, 522 N.E.2d 758 (1988) ("damages" do not include equitable environmental compliance action); *Patrons Oxford Mutual Ins. Co. v. Marois*, 573 A.2d 16 (Me. 1990) (response costs are not "damages"); *Jones v. Farm Bureau Mut. Ins. Co.*, 172 Mich. App. 24, 431 N.W.2d 242 (1988) (the word "damages" given its ordinary and plain meaning cannot encompass a strictly injunctive action).

The artificial distinction promulgated by insurers between equitable relief and legal damages has caused needless litigation and delayed cleanup of hazardous waste pollution. The purposes of CERCLA, specifically, deterrence of continued pollution of the environment, will be better served, and the amount of needless litigation reduced, if the interpretation of the "as damages" clause is settled.²⁴

This Comment will examine the CERCLA provisions that empower the government to clean up dangerous hazardous waste sites and to seek reimbursement of clean-up costs from polluters. It will then outline the standard provisions of CGL policies, which require insurers to indemnify insureds for all costs incurred "as damages" under the terms of the policy. Next, the Comment will set forth the two primary methods of interpretation employed by courts to determine whether CERCLA response costs are covered damages under CGL policies. The Comment will then set forth Washington law which provided the foundation for the Washington Supreme Court's decision in *Boeing* and will analyze the *Boeing* decision. Finally, this Comment concludes that public policy strongly favors coverage of clean-up costs "as damages."

II. THE CLEAN-UP MECHANISM: CERCLA

Congress enacted CERCLA to facilitate the cleanup of the nation's abandoned or inactive hazardous waste sites.²⁵ Unfortunately, to date this purpose has not been effectuated.

24. Furthermore, companies and individuals that knowingly pollute still may be held liable for clean-up costs under other provisions of CGL policies. CGL policies deny coverage if the polluter "expected or intended" the pollution. Thus, if a polluter knowingly polluted, no coverage is provided. For example, following the resolution of the "as damages" case, Boeing again brought suit against its insurers to recover clean-up costs at Western Processing and Queen City Farms, two of the toxic waste sites used by Boeing. This time, the insurers defended against liability by arguing that the CGL policy issued to Boeing exempts liability if the insured "expected or intended" the pollution to occur. *Boeing Co. v. Aetna Casualty and Sur. Co.*, No. C86-352WD, (W.D. Wash. Sept. 21, 1990). A jury found that Boeing had neither expected nor intended an environmental threat at Western Processing between 1964 and April, 1972. The jury did find, however, that from January 1, 1971 through 1977, Boeing knowingly polluted at Western Processing. *Boeing, Insurers Both To Pay for Cleanup at the Sites, Jury Decides*, Fed. Cont. Rep. (BNA) No. 54, at 490 (Oct. 1, 1990). The jury also found that between 1957 and 1968 Boeing did not intentionally pollute at Queen City Farms, but that it did knowingly pollute there between 1968 and 1977. *Id.* Accordingly, under the "expected and intended" clause of the CGL policy, the insurers were liable only for the policy period during which Boeing did not knowingly pollute.

25. United States General Accounting Office Report to Congress, *Hazardous Waste Issues Surrounding Insurance Availability* 37 (October 1987).

Rather, the clean up of hazardous waste sites has been slow: between 1980 and 1984, only ten of 538 sites on the National Priorities List²⁶ were actually cleaned up.²⁷ This delay is due, in part, to insufficient Congressional appropriations funding Superfund.²⁸ Congress provided Superfund with \$8.5 billion to finance the cleanup of hazardous waste sites;²⁹ however, the enormous cost to clean up the abandoned and inactive sites greatly exceeds Superfund appropriations.

In 1988, 1177 sites appeared on the EPA's National Priorities List.³⁰ With an estimated average clean-up cost of \$30 million per site, the total cost of cleaning up these sites is currently expected to reach approximately \$35 billion.³¹ Moreover, if 27,000 tentative sites are added to the National Priorities List in the future, the cost may escalate another \$810 billion.³² Clearly, Superfund alone cannot finance the cleanup of all potential National Priorities List sites. Indeed, because of this shortage of funds, the EPA increasingly has begun to enforce private party cleanups or has performed the cleanups and subsequently sought reimbursement from identified polluters.³³ Mandatory cleanups have led, in turn, to collateral lit-

26. CERCLA requires the EPA to compile the National Priorities List, which identifies those hazardous waste sites requiring cleanup. 42 U.S.C. § 9605(8).

27. Lathrop, *supra* note 17, at 156. Since 1981, only 34 of the 1175 most contaminated toxic waste sites were cleaned up. Avondale Indus., Inc. v. Travelers Indem. Co., 887 F.2d 1200, 1201 (2nd Cir. 1989), *cert. denied*, 110 S.Ct. 2588 (1990).

28. CERCLA establishes two separate funds to pay for the cleanup of hazardous waste sites. The Post-Closure Liability Trust Fund (42 U.S.C. § 9641 (1988)) finances cleanups at hazardous waste sites closed pursuant to CERCLA regulations. (CERCLA § 107(k), CERCLA § 111(j); 42 U.S.C. § 9607(k) and 42 U.S.C. § 9611(j)). The Fund is financed by a tax on hazardous waste received at hazardous waste disposal facilities. All other remedial actions are financed by the "Hazardous Substance Response Trust Fund," or Superfund. (CERCLA § 111(a); 42 U.S.C. § 9611(a)). Most of Superfund's initial funding was derived from taxes on petroleum and chemical products (SARA 516(a); 26 U.S.C. § 59A (West Supp. 1987); the remainder of the funds are derived from general revenues. (SARA 517(b), 26 U.S.C. § 9507). Superfund appropriations may only be used to clean up sites on the National Priorities List. 42 U.S.C. § 9605(a)(8)(A).

29. Congress initially appropriated \$1.6 billion for Superfund. However, this level of funding proved inadequate to clean up the sites on the National Priorities List. Thus, Congress passed the Superfund Amendments and Reauthorization Act (SARA), increasing CERCLA funding to \$8.5 billion for the five-year period ending in 1991. General Accounting Office, Report to Congress, No. GAO/RCED-88-2, HAZARDOUS WASTE ISSUES SURROUNDING INSURANCE AVAILABILITY 38 (1987) [hereinafter *GAO Report*].

30. Lathrop, *supra* note 17, at 156.

31. *Id.*

32. *Id.*

33. *Id.* at 151.

igation as more and more polluters seek indemnification from their insurers to cover reimbursement of clean-up costs.

Mandatory cleanups help relieve the financial burden on Superfund. If the government proves that a potentially responsible party exercised some control³⁴ over a hazardous substance that threatens the public health or the environment, the party will be held strictly liable for clean-up costs.³⁵ Under the strict liability standard, the government need only identify a potentially responsible party as a contributor to a hazardous waste site to impose liability on that contributor for the cleanup of any site.³⁶ Thus, the government need not show that a generator was aware that its waste contributed to a polluted site before holding the generator liable for the clean-up of that site.³⁷ Moreover, all potentially responsible parties³⁸ are jointly and severally liable for clean-up costs incurred by the government or any other person.³⁹ Because of CERCLA's provision for joint and several liability, the government can hold one party strictly liable for *all* clean-up costs, irrespective

34. Because statutory definitions of the liable parties are broad, courts have looked to the degree of the defendant's control over the disposal. *Developments in the Law: Toxic Waste Litigation*, 99 HARV. L. REV. 1458, 1514 (1986). For example, a party lacking legal title to land may be considered an "owner" if the party had the authority to determine the manner in which the land was used. *Id.*

35. CERCLA does not expressly provide a standard of liability; instead, Congress intended for courts imposing liability under the Act to utilize the same standard of liability as that imposed under the Federal Water Pollution Control Act, located at 33 U.S.C. § 1321 (1988). 42 U.S.C. § 9601(32). Courts have interpreted this standard as one of strict liability. See *United States v. South Carolina Recycling & Disposal, Inc.*, 653 F. Supp. 984 (D.S.C. 1984), *aff'd in part and vacated in part sub nom.*, *United States v. Monsanto*, 858 F.2d 160 (4th Cir. 1988), *cert. denied*, 109 S.Ct. 3156 (1989); *United States v. Conservation Chem. Co.*, 590 F. Supp. 50 (W.D. Mo. 1984). See also *Developments in the Law: Toxic Waste Litigation*, 99 HARV. L. REV. at 1518. Thus, strict liability has been judicially adopted as the standard applicable to claims under CERCLA.

By adopting a standard of strict liability, these courts have adopted the standard that will most effectively aid in the clean up of hazardous waste contamination. Under a negligence standard, by contrast, the government would clean up fewer hazardous waste sites because (1) the government would be unable to meet the burden of proving that some responsible parties acted negligently and (2) the expense to the government of litigating under a negligence standard would be greater than under a strict liability standard. *Id.*

36. *Developments in the Law: Toxic Waste Litigation*, 99 Harv. L. Rev. at 1518.

37. *Id.* GAO Report, *supra* note 29, at 38.

38. Under CERCLA, four classes of persons may be held liable for clean-up costs. See *infra* note 55.

39. GAO Report, *supra* note 29, at 38; Mountainspring, *Insurance Coverage of CERCLA Response Costs: The Limits of "Damages" in Comprehensive General Liability Policies*, 16 ECOLOGY L.Q. 755, 757 (1989).

of the proportion of waste attributed to that party.⁴⁰ A potentially responsible party may be released from liability only if it can establish that the release was caused solely by an act of God, an act of war, or an act or omission by a third party;⁴¹ thus, to be relieved of liability, the responsible party essentially must prove that it did not cause the release.

CERCLA provides a number of different means by which the federal government or a private party may seek to impose liability on responsible parties. The EPA may seek a mandatory injunction to compel responsible parties to clean up a contaminated site.⁴² Alternatively, the EPA may undertake

40. Furthermore, CERCLA may be applied retroactively to impose liability against parties who disposed of hazardous waste prior to its enactment. *United States v. Wade*, 577 F. Supp. 1326 (E.D. Pa. 1983); *See generally* *United States v. Shell Oil Co.*, 605 F. Supp. 1064 (D. Colo. 1985).

41. 42 U.S.C. § 9607(b) provides in relevant part:

There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of evidence that the release or threat of release of a hazardous substance and damages resulting from it were caused solely by-

- (1) an act of God;
- (2) an act of war;
- (3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or (4) any combination of the foregoing paragraphs.

If a potentially responsible party is named in a CERCLA action, the likelihood of avoiding liability is extremely small. Thus, the potentially responsible parties' hopes of limiting response costs include settling or searching out other responsible parties. The Superfund Amendments provide that potentially responsible parties have the right to contribution from any persons who are "liable or potentially liable under 42 U.S.C. § 9607(a)," except that contribution is barred by nonsettling potentially responsible parties against potentially responsible parties who have entered into settlement with the government. 42 U.S.C. § 9613(f)(1)-(2).

42. CERCLA § 106(a) provides in relevant part:

[W]hen the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat . . .

42 U.S.C. § 9606(a).

cleanup on its own⁴³ and seek reimbursement for the costs from the responsible parties.⁴⁴ Similar to government actions, a private party may clean up a contaminated site and seek recovery against Superfund.⁴⁵ Alternatively, a private party may forego its claim against Superfund and instead seek recovery of the clean-up costs from the responsible parties.⁴⁶ EPA action against responsible parties seeking reimbursement of its clean-up costs is most often the source of the dispute regarding the "as damages" clause of CGL policies and, therefore, is the focus of this Comment.

Under CERCLA section 104, the EPA is authorized to take direct action to clean up hazardous waste sites.⁴⁷ The EPA may exercise this authority when a hazardous substance⁴⁸

43. CERCLA § 104 provides in relevant part:

Whenever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare, the President is authorized to act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time (including its removal from any contaminated natural resource), or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment.

42 U.S.C. § 9604(a)(1).

44. CERCLA § 107(a)(4) provides in relevant part:

[A]ny person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for —

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan; or

....

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release.

42 U.S.C. § 9607(a)(4).

45. 42 U.S.C. § 9607(a)(4)(B). Any person who has incurred clean-up costs may recover against Superfund if the costs were approved under the requirements of the National Contingency Plan and certified by the responsible federal official. 42 U.S.C. § 9611(a)(2).

46. Under this private party cause of action, damages must be "necessary costs of response" and must be consistent with the National Contingency Plan. 42 U.S.C. § 9607(a)(4)(B).

47. 42 U.S.C. § 9604(a)(1).

48. CERCLA defines hazardous substances broadly to include toxic substances

is released into the environment or when a release poses an "imminent and substantial danger" to public health and welfare.⁴⁹ Because section 104 enables the EPA to quickly initiate emergency clean-up efforts, this section is most often invoked when the contamination poses a serious danger to public health or the environment.⁵⁰

Upon the designation of a site as contaminated, the EPA may take direct action, a response action, to clean up the designated area.⁵¹ The EPA's response action may take one of two forms: a removal action or a remedial action. A removal action is a short-term solution designed to correct the threat of immediate harm.⁵² A remedial action results in a permanent cleanup of a polluted site.⁵³ Superfund finances both removal actions and remedial actions.

After the performance of a section 104 cleanup, CERCLA section 107 authorizes the EPA to seek reimbursement of the

designated under federal legislation. 42 U.S.C. § 9601(14). Specifically, 42 U.S.C. § 9601(14) defines a hazardous substance as any substance designated pursuant to 33 U.S.C. § 1321(b)(2)(A) and 42 U.S.C. § 9602(a); any hazardous waste with the characteristics identified under the Solid Waste Disposal Act, 42 U.S.C. § 6921; any toxic pollutant listed under 33 U.S.C. § 1317(a); and any hazardous air pollutant listed under section 112 of the Clean Air Act, 42 U.S.C. § 7412. However, the CERCLA definition of hazardous substances excludes oil products. In addition to substances defined in the above Acts, the Administrator of the EPA is required to designate as hazardous substances any other materials which, if released into the environment, "will present a substantial danger to public health or welfare or environment." 42 U.S.C. § 9602(a).

49. 42 U.S.C. § 9604(a)(1)(B).

50. *Developments in the Law: Toxic Waste Litigation*, 99 HARV. L. REV. 1462, 1486 (1986).

51. 42 U.S.C. § 9604(a).

52. CERCLA defines a removal action as:

the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release.

42 U.S.C. § 9601(23).

53. A remedial action includes:

[t]hose actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment.

42 U.S.C. § 9601(24).

costs incurred.⁵⁴ The responsible parties from whom the EPA may seek reimbursement for clean-up costs include generators, transporters, and disposers of hazardous substances, as well as owners or operators of disposal sites.⁵⁵ Under section 107, the EPA may seek recovery from these responsible parties for clean-up costs incurred or for damages for the injury to natural resources. Specifically, under section 107(a)(4)(A), responsible parties are liable for the costs incurred by the EPA for remedial or removal actions.⁵⁶ Alternatively, under section 107(a)(4)(C), responsible parties are liable for damages for injury to, destruction of, or loss of natural resources resulting from a pollution release.⁵⁷ Thus, subsections (A) and (C) of section 107(a)(4) establish separate and distinct forms of liability. This distinction is significant in the determination of whether response costs are damages under a CGL policy.

III. COMPREHENSIVE GENERAL LIABILITY INSURANCE POLICIES: THE "AS DAMAGES" CLAUSE

Recently, the EPA has increasingly relied on its section 107(a)(4)(A) authority to finance hazardous waste cleanup by performing the cleanup itself and subsequently seeking reimbursement from responsible parties.⁵⁸ Responsible parties, in turn, have sought indemnification from their liability insurance carriers,⁵⁹ contending that CERCLA response costs are

54. 42 U.S.C. 9607(a).

55. Under 42 U.S.C. § 9607(a), four classes of persons may be liable for costs to clean up hazardous waste contamination, including:

- (1) the owner and operator of a vessel or a facility,
- (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
- (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
- (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance.

Id.

56. 42 U.S.C. § 9607(a)(4)(A). *See supra* note 44.

57. 42 U.S.C. § 9607(a)(4)(C). *See supra* note 44.

58. *See supra* notes 55-56 and accompanying text.

59. Liability insurance transfers risk from parties who are risk adverse to entities willing to bear risk. Insurance also distributes and spreads risk among parties to an

covered by the broad terms of the CGL policies they purchased.⁶⁰ Conversely, insurers contend that CGL policies were never contemplated to provide coverage for the costs of cleaning up such environmental damage.

Under the standard CGL policy⁶¹ an insurer is obligated to pay for "all sums which the insured shall become legally obligated to pay as damages⁶² because of bodily injury or property damage caused by an occurrence."⁶³ Although CGL policies define the term "property damage,"⁶⁴ they do not define the

insurance contract, thereby lessening the burden of the risk on individual companies or individuals. R. KEETON, *BASIC TEXT ON INSURANCE LAW* 2 (1971); Abraham, *Environmental Liability and the Limits of Insurance*, 88 COLUM. L. REV. 942, 945-46 (1988).

60. Note, *The Applicability of General Liability Insurance to Hazardous Waste Disposal*, 57 S. CAL. L. REV. 745, 757 (1984) ("The very title 'Comprehensive General Liability Insurance' suggests the expectation of maximum coverage.").

61. The CGL policy is the standard type of insurance policy sold to businesses to insure against damages caused by environmental pollution. E. Anderson & T. Sear, *Insurance Coverage for Environmental Liability: Technical and Legal Considerations*, ENVIRONMENTAL AND TOXIC TORT CLAIMS, INSURANCE COVERAGE IN 1989 AND BEYOND 35, 42 (1989); Spurgeon, *supra* note 19, at 379 (the CGL policy is the most frequently purchased insurance policy); *American Home Products*, 565 F. Supp. at 1500.

Since the inception of CGL policies, coverage for pollution-related harm has undergone three distinct phases. See Note, *The Pollution Exclusion Clause Through the Looking Glass*, 74 GEO. L.J. 1237, 1241 (1986). Prior to 1966, CGL policies covered liability caused by an "accident," a term insurers intended to include only "sudden and unexpected" events. *American Home Products Corp. v. Liberty Mut. Ins. Co.*, 565 F. Supp. 1485, 1501 (S.D.N.Y. 1983) *aff'd. as modified*, 748 F.2d 760 (2nd Cir. 1984). Judicial interpretation of accident-based policies expanded coverage for pollution-related losses from sudden and unexpected events to include coverage of harm resulting from gradual leakage of hazardous waste. As a result, in 1966, the insurance industry switched from "accident-based" policies to "occurrence-based" policies to limit coverage for pollution-related losses and to combat the uncertainty of future judicial interpretations. Note, *supra*, at 1246. Under the occurrence-based policies, the insurers indemnified insureds for liability only if the loss was unexpected and unintended from the insured's standpoint. *Id.* at 1247. Occurrence-based policies were introduced before the dramatic growth in pollution-related litigation. In 1971, in response to concerns that pollution-related claims dramatically would increase, insurers again amended CGL policies, this time to include "pollution exclusion" clauses that restrict coverage to pollution damages resulting from polluting events that were "sudden and accidental." *Id.* at 922.

62. See *supra* note 19.

63. Under a CGL policy, an occurrence is defined as "an accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury or property damage, neither expected nor intended from the standpoint of the insured." *Mraz v. Canadian Universal Ins. Co. Ltd.*, 804 F.2d 1325, 1327 (4th Cir. 1986). The general rule is that the time of the occurrence is when the party was actually damaged. *Id.* at 1328.

64. Under typical CGL policies, property damage is defined as:

- (a) physical injury to or destruction of tangible property, including the loss of use thereof at any time resulting therefrom, or
- (b) loss of use of tangible

term "damages" and consequently, disputes, and ultimately litigation, have resulted from conflicting interpretations of the term.

Courts faced with the task of defining the term "damages" have been sharply divided and have reached inconsistent conclusions.⁶⁵ In determining whether environmental response costs constitute damages within the meaning of CGL policies, some courts have adopted a broad, plain meaning interpretation of the term.⁶⁶ Under this broad interpretation, the term "damages" includes both legal damages and equitable monetary relief. Thus, for these courts, clean-up costs are compensatory damages recoverable under a CGL policy. By contrast, other courts have adopted a narrow interpretation of the term "damages."⁶⁷ Under this narrow interpretation, the term means only legal damages and does not include equitable monetary relief. Thus, because these courts consider reimbursement of clean-up costs equitable monetary relief such costs are not recoverable under a CGL policy.

Under the latter analysis, the distinction between legal damages and equitable monetary relief is crucial in determining whether CERCLA response costs are "damages" within the

property which has not been physically injured or destroyed, provided such loss of use is caused by an occurrence during the policy period.

United Pacific Ins. Co. v. Van's Westlake Union, Inc. 34 Wash. App. 708, 664 P.2d 1262 (1983); Spurgeon, *supra* note 19, at 393. A number of courts have held that federal and state ordered cleanups of hazardous waste sites are claims for "property damage" under the coverage provisions of CGL policies. See Port of Portland v. Water Quality Ins. Syndicate, 796 F.2d 1188, 1194 (9th Cir. 1986) (discharge of pollution into water causes damage to tangible property and thus clean-up costs are recoverable under CGL policies); C.D. Spangler Constr. Co. v. Indus. Crankshaft and Eng'g Co., 326 N.C. 133, 388 S.E.2d 557 (1990) (state's interest in protecting its natural resources is a form of property right and thus injury to natural resources is property damage under CGL policies).

65. Compare *Aerojet-General v. San Mateo County Super. Ct.*, 211 Cal. App. 3d 216, 278, 257 Cal. Rptr. 621, 628 (1989) (response costs for cleanup of pollution were "damages" within the meaning of the coverage clause of the CGL policy, whether or not costs were equitable relief or damages) and *Avondale Indus., Inc. v. Travelers Indem. Co.*, 887 F.2d 1200, 1206-07 (2nd Cir. 1989), *cert. denied*, 110 S.Ct. 2588 (1990) with *Continental Ins. Co. v. Northeastern Pharmaceutical & Chem. Co., Inc.*, 842 F.2d 977, 985 (8th Cir. 1988), (en banc) (interpreting Missouri law and holding that the plain meaning of the term "damages" used in the CGL policies refers to legal damages and does not cover clean-up costs), *cert. denied*, 488 U.S. 821 (1988) and *Maryland Casualty Co. v. Armco, Inc.*, 822 F.2d 1348, 1352 (4th Cir. 1987) (stating that "[t]he best approach in construing the term 'damages' . . . is to afford it the legal, technical meaning . . ." and holding that clean-up costs under CERCLA § 107(a) were not covered by the CGL policy), *cert. denied*, 484 U.S. 1008 (1988).

66. See cases cited *supra*, note 22.

67. See cases cited *supra*, note 23.

meaning of CGL policies.⁶⁸ While the distinction between law and equity is largely historical, the underlying substantive concepts have been retained.⁶⁹ Equitable remedies are restitutionary in nature and restore what rightfully belongs to the innocent party.⁷⁰ In contrast, legal damages simply compensate for losses incurred by the innocent party. According to the insurers, reimbursement of clean-up costs constitutes equitable monetary relief and, in the insurers' interpretation, such equitable monetary relief is not contemplated by the term "damages."

According to insurers, and some courts, the plain meaning of the term "damages," as understood within the insurance industry, is very narrow and refers only to legal damages and not equitable monetary relief.⁷¹ By contrast, those outside of the insurance industry interpret the term "damages" broadly, without distinguishing between legal and equitable remedies.⁷²

68. See *Cincinnati Ins. Co. v. Milliken & Co.*, 857 F.2d 979, 981 (4th Cir. 1988) (the term "damages" in the insurance context is not ambiguous and means legal damages); *Varlan Ltd. v. John L. Armitage & Co.*, 695 F. Supp. 950, 953-55 (N.D. Ill. 1988) (CERCLA response costs claims do not seek "damages," but rather restitutional relief); *Mraz v. American Universal Ins. Co.*, 804 F.2d 1325, 1329 (4th Cir. 1986) (clean-up costs are economic losses but not damages under a CGL policy).

69. Courts have relied on two tests to classify an action as legal or equitable: (1) whether the cause of action was historically considered a legal or equitable proceeding; and (2) whether, according to the substance of the claim, the claimant seeks legal or equitable relief. *Maryland Cas. Co. v. Armco, Inc.*, 822 F.2d 1348, 1352 (4th Cir. 1986); Heintz, *The "As Damages" Issue: A Focal Point Insurance Coverage Litigation in the Face of Stepped-Up EPA Enforcement Activity*, ENVIRONMENTAL AND TOXIC TORT CLAIMS: INSURANCE COVERAGE IN 1989 AND BEYOND, 177, 190 (1989).

In the "as damages" context, some courts have denounced the distinction between law and equity as irrelevant:

In this context the argument concerning the historical separation of damages and equity is not convincing and it seems to me that the insured ought to be able to rely on the common sense expectation that property damage within the meaning of the policy includes a claim which results in causing him to pay sums of money because his acts or omissions affected adversely the rights of third parties. . . . The short answer is that from the standpoint of the insured damages are being sought for injury to property. It is that contractual understanding rather than some artificial and highly technical meaning of damages which ought to control.

United States Fidelity & Guar. Co. v. Thomas Solvent Co., 683 F. Supp. 1139, 1168 (W.D. Mich. 1988).

70. D. Dobbs, *HANDBOOK ON THE LAW OF REMEDIES*, 136-37 (1973).

71. *Continental Ins. v. Northeastern Pharmaceutical & Chem. Co.*, 842 F.2d 977, 985 (8th Cir.) (en banc), cert. denied, 488 U.S. 821 (1988) (citing *Maryland Casualty Co. v. Armco, Inc.*, 822 F.2d 1348, 1352 (4th Cir. 1987), cert. denied, 484 U.S. 1008 (1988)).

72. *Id.*

A. Coverage for Clean-up Costs: A Broad Interpretation of the Term "Damages"

Courts holding that clean-up costs are recoverable under CGL policies have employed one of two different analyses. Under the first analysis, courts interpret damages in accordance with the meaning the average insured would give the term.⁷³ Under the second analysis, courts simply deem any distinction between legal damages and equitable monetary relief to be irrelevant.⁷⁴

Courts utilizing the first method of analysis reason that insurance contracts must be interpreted in accordance with the meaning the average insurance purchaser would give to the policy terms.⁷⁵ Because CGL policies do not define the term "damages" or include any specific language limiting coverage to *legal* damages, these courts have turned to state contract law to interpret the term "damages" in accordance with its plain and ordinary meaning.⁷⁶ Under the contract law of many states, the reasonable expectations of the insured is the determinative factor.⁷⁷ These courts reason that the term "dam-

73. *National Indem. Co. v. United States Pollution Control*, 717 F. Supp. 765 (W.D. Okla. 1989) (because CGL policies do not "affirmatively" restrict coverage to legal damages, the plain, ordinary meaning of damages must be used); *Chesapeake Utilities Corp. v. American Home Assurance Co.*, 704 F. Supp. 551 (D. Del. 1989) (the technical definition of damages is not the ordinary meaning); *New Castle County v. Hartford Accident & Indem. Co.*, 673 F. Supp. 1359 (D. Del. 1987) (under Delaware law, terms of an insurance contract are given their "ordinary, usual" meaning in accordance with the reasonable expectations of the insured); *Aerojet-General v. San Mateo County Super. Ct.*, 211 Cal. App. 3d 216, 257 Cal. Rptr. 621 (1989) (ordinary insured would expect environmental clean-up costs to be "damages"); *Minnesota Mining & Mfg. Co. v. Travelers Indem. Co.*, 457 N.W.2d 175 (Minn. 1990) (ambiguous terms within an insurance policy must be interpreted in favor of the insured); *C.D. Spangler Constr. Co. v. Industrial Crankshaft and Eng'g Co.*, 326 N.C. 133, 388 S.E.2d 557 (1990) (the term "damages" in CGL policies is not used in a legal or technical sense).

74. *Fireman's Fund Ins. Co. v. Ex-Cell-O Corp.*, 662 F. Supp. 71, 75 (E.D. Mich. 1987) ("coverage does not hinge on the form of relief taken or the nature of relief sought, but on an actual or threatened use of legal process to coerce payment or conduct by a policyholder"); see also *United States Aviax Co. v. Travelers Ins. Co.*, 336 N.W.2d 838, 843 (Mich. App. 1983).

75. See *AIU Ins. Co. v. Super. Ct. of Santa Clara County*, 51 Cal.3d 807, 274 Cal. Rptr. 820, 799 P.2d 1253, 1267 (1990).

76. See *Aerojet-General*, 211 Cal. App. 3d at 224-25, 257 Cal. Rptr. at 625-26.

77. *New Castle County v. Hartford Accident & Indem. Co.*, 673 F. Supp. 1359, 1365 (D. Del. 1987) (rejecting the "legal, technical" definition of damages and adopting Delaware law under which the terms of an insurance policy are given their "ordinary, usual meaning" in accordance with the reasonable expectations of the insured. Because the ordinary dictionary definition of damages does not distinguish between actions at law and equity, "damages" in CGL policies includes remedial expenses to clean up hazardous waste contamination). The standard is the reasonable expectation

ages" within CGL policies cannot be limited to strictly legal damages because the insured would not reasonably expect such a limitation on coverage.⁷⁸

In *Avondale Industries, Inc. v. Travelers Indemnity Co.*,⁷⁹ the Second Circuit reasoned that, under New York law, the terms of an insurance policy should be interpreted in accordance with "the reasonable expectation and purpose of the ordinary businessman."⁸⁰ The *Avondale* court affirmed a partial summary judgment declaring that the insurer had a duty to defend Avondale in private litigation and a public administrative proceeding filed against Avondale.⁸¹ The actions in *Avondale* stemmed from personal injury and property damage caused by oil and chemical waste by-products of Avondale's operations.⁸² Because the CGL policy in question did not include language limiting the scope of the term "damages," the court concluded that damages must be construed to include remedial costs of cleanup.⁸³ The court noted that if an insurer wants to exclude certain damages from coverage, the insurer must include clear and unmistakable exclusionary language in the CGL policy.⁸⁴

Other courts have looked to the insured's reasonable expectations upon finding that, within CGL policies, the term "damages" is ambiguous.⁸⁵ Generally, under contract law, when a term is ambiguous—or open to differing interpretations—the term must be interpreted in favor of the insured.⁸⁶

of the average lay insured and the standard does not vary with the sophistication of the insured. *Boeing Co. v. Aetna Casualty and Sur. Co.*, 113 Wash. 2d 869, 882-83, 784 P.2d 507, 514 (1990).

78. *Intel Corp. v. Hartford Accident & Indem. Co.*, 692 F. Supp. 1171, 1190 (N.D. Cal. 1988); *Aerojet-General*, 211 Cal. App. 3d at 228, 257 Cal. Rptr. at 628 (1989); *Minnesota Mining & Mfg. Co. v. Travelers Indem. Co.*, 457 N.W.2d 175, 181 (Minn. 1990).

According to the court in *Aerojet*, "[i]t would come as an unexpected, if not incomprehensible shock, to the insureds to discover that their insurance coverage was being denied because the plaintiff chose to frame his complaint in equity rather than in law." *Aerojet-General*, 209 Cal. App. 3d at 228, 257 Cal. Rptr. at 628.

79. 887 F.2d 1200 (2d Cir. 1989), *cert. denied*, 110 S.Ct. 2588.

80. *Id.* at 1207 (citing *Ace Wire & Cable Co. v. Aetna Casualty & Sur. Co.*, 60 N.Y.2d 390, 398, 469 N.Y.S.2d 655, 658, 457 N.E.2d 761, 764 (1983)).

81. *Id.* at 1201.

82. *Id.*

83. *Id.*

84. *Id.* at 1207.

85. *See Aerojet-General v. San Mateo County Super. Ct.*, 211 Cal. App. 3d 216, 257 Cal. Rptr. 621 (1989).

86. 2 G. COUCH, COUCH CYCLOPEDIA OF LAW § 15.83, 399 (2d ed. 1984).

In *Aerojet-General Corp. v. San Mateo County Superior Court*,⁸⁷ the California Court of Appeals reasoned that the term "damages" is ambiguous within CGL policies because the term is susceptible to two reasonable interpretations: legal damages or equitable monetary relief.⁸⁸ The *Aerojet* court reversed a summary adjudication that no portion of environmental cleanup and restoration costs imposed upon the insured by state and federal governments constituted "damages" within a CGL policy. The court concluded that because the term "damages" could mean either damages at law or equity, persons purchasing a CGL policy would reasonably expect to be insured if their negligence caused injury to or loss of the use property.⁸⁹

Generally, courts adopting the plain meaning analysis reason that if insurers intended to exclude coverage for response costs, CGL policies would include exclusionary language limiting the scope of liability to specific types of damages.⁹⁰ Because CGL policies do not expressly restrict insurers' liability to legal damages, these courts argue that a narrow interpretation of damages is inconsistent with the language and structure of CGL policies.

Courts that have found in favor of coverage by utilizing the second type of analysis reason that any technical distinction between legal damages and equitable monetary relief is irrelevant for the purpose of determining whether response costs are covered under CGL policies.⁹¹ Focusing on the substance of government cleanup mandates and not the form of coverage, these courts maintain that the insurer is liable for response costs irrespective of whether the costs result from compensation for injury to natural resources under CERCLA section 107(a)(4)(C) or reimbursement of clean-up expenses under CERCLA section 107(a)(4)(A).⁹² For these courts, both

87. 211 Cal. App. 3d 216, 257 Cal. Rptr. 621 (1989).

88. *Id.* at 226, 257 Cal. Rptr. at 627.

89. *Id.*

90. Insurers have included pollution exclusion clauses in CGL policies to limit the insurers' liability for damage caused by a sudden and accidental polluting event. *United Pacific Ins. v. Van's Westlake Union, Inc.* 34 Wash. App. 708, 664 P.2d 1262 (1983). See also *supra* note 61.

91. See *supra* note 74.

92. *Intel Corp. v. Hartford Accident & Indem. Co.*, 692 F. Supp. 1171 (N.D. Cal. 1988); *Fireman's Fund Ins. Co. v. Ex-Cell-O Corp.*, 662 F. Supp. 71 (E.D. Mich. 1987); *United States Aviax Co. v. Travelers Ins. Co.*, 125 Mich. App. 579, 336 N.W.2d 838 (1983).

types of costs are damages and coverage does not turn on the "fortuitous" distinction between whether the government performs the cleanup and then sues for reimbursement or whether the government sues for compensation for the value of environmental losses.⁹³

The leading case declaring the distinction between legal damages and equitable monetary relief to be irrelevant is *United States Aviox Co. v. Travelers Insurance Co.*⁹⁴ In that case, Aviox initiated a declaratory judgment action to determine an insurer's obligation to indemnify the company for the costs incurred by the EPA in cleaning up chemical contamination caused by percolating waters beneath Aviox's property.⁹⁵ The *Aviox* court rejected the narrow definition of damages,⁹⁶ finding that under a Michigan statute the state is empowered to file suit to recover the value of injury to natural resources.⁹⁷ Thus, the Michigan Court of Appeals reasoned that if the EPA sued directly to recover the costs the agency incurred in cleaning up pollution, the insurer would be obligated to indemnify its insured for sums the insured was legally obligated to pay.⁹⁸ Likewise, the court held that insurers are liable for response costs when the alleged polluter undertakes a government-mandated cleanup and subsequently seeks reimbursement from its insurers.⁹⁹ The court concluded that because the cost of cleanup is the cost to restore the property to its original state,

93. The court in *Aviox* noted that:

If the state were to sue in court to recover in traditional "damages", [sic] including the state's costs incurred in cleaning up the contamination, for the injury to the groundwater, defendant's obligation to defend against the lawsuit and to pay damages would be clear. It is merely fortuitous from the standpoint of either plaintiff or defendant that the state has chosen to have plaintiff remedy the contamination problem, rather than choosing to incur the costs of clean-up itself and then suing plaintiff to recover those costs.

125 Mich. App. at 589-90, 336 N.W.2d at 843.

94. *Id.*, 125 Mich. App. 579, 336 N.W.2d 838. See also *Intel Corp. v. Hartford Accident & Indem. Co.*, 692 F. Supp. 1171, 1188 (N.D. Cal. 1988) (adopting the analysis in *Aviox* that the distinction between the direct payment for clean-up costs and the reimbursement of such costs is irrelevant); *Fireman's Fund Ins. Co. v. Ex-Cell-O Corp.*, 662 F. Supp. 71 (E.D. Mich. 1987) ("The insurers construe their policies too narrowly: coverage does not hinge on the form of action taken or the nature of relief sought, but on an actual or threatened use of legal process to coerce payment or conduct by a policyholder.").

95. *Aviox*, 125 Mich. App. at 582-83, 336 N.W.2d at 840.

96. *Id.* at 589, 336 N.W.2d at 842-43.

97. *Id.* at 589, 336 N.W.2d at 843.

98. *Id.* at 589-90, 336 N.W.2d at 843. These costs are those incurred under CERCLA § 107(a)(4)(C).

99. *Id.* These costs are those incurred under CERCLA § 107(a)(4)(A).

the CGL policy covers clean-up costs under either cleanup mechanism.¹⁰⁰

B. No Coverage for Clean-up Costs: A Narrow Interpretation of the Term "Damages"

Courts that have adopted a narrow interpretation of the "as damages" clause in CGL policies strictly construe the term "damages" as legal damages.¹⁰¹ Classically, these courts distinguish claims for "damages" from claims for injunctive or restitutionary relief, limiting damages to "'payments to third persons when those persons have a legal claim for damages'"¹⁰² Insurers argue this narrow, technical definition of the term "damages" in an effort to avoid liability under CERCLA section 107.¹⁰³

By adopting a narrow interpretation of the "as damages" clause, courts limit an insurers' liability under the CGL policy to awards against the insured for money damages. Such damages include compensation for harm to natural resources under CERCLA section 107(a)(4)(C).¹⁰⁴ However, under the narrow interpretation of the term "damages," insurers argue that they are not liable for reimbursement of clean-up costs under CERCLA section 107(a)(4)(A)¹⁰⁵ because, according to insurers, that section does not provide a legal remedy.¹⁰⁶ Instead, under subsection (A) of section 107(a)(4), the alleged polluter reimburses the EPA for costs incurred in cleaning up the waste; reimbursement, or restitution, is an equitable remedy, not a legal remedy. Thus, under the narrow interpretation, insurers conclude that the costs of complying with equitable remedies are not damages under the "as damages" clause of a CGL policy, and therefore, they have no duty to indemnify the insured

100. *Id.* at 590, 336 N.W.2d at 843.

101. *See supra* note 23.

102. *Maryland Casualty Co. v. Armco, Inc.*, 822 F.2d 1348, 1352 (4th Cir. 1987), cert. denied, 484 U.S. 1008 (1988) (quoting *Aetna Casualty and Sur. Co. v. Hanna*, 224 F.2d 499, 503 (5th Cir. 1955)).

103. *Continental Ins. Co. v. Northeastern Pharmaceutical & Chem. Co.*, 842 F.2d 977, 985-86 (8th Cir.), cert. denied, 488 U.S. 821 (1988) [hereinafter "NEPACCO"]; *Armco*, 822 F.2d at 1352.

104. *See supra* note 44 and accompanying text.

105. *Id.*

106. In *NEPACCO*, the court specifically distinguished between the nature of the relief granted under § 107(a)(4)(A) and that granted under § 107(a)(4)(C): "[u]nder CERCLA [subsection (A)] clean-up costs are not substantially equivalent to [subsection (C)] compensatory damages for injury to or destruction of the environment." 842 F.2d at 986.

for claims under subsection (A).¹⁰⁷

*Maryland Casualty Co. v. Armco*¹⁰⁸ and *Continental Insurance Co. v. Northeastern Pharmaceutical & Chemical Co.* (hereinafter "NEPACCO")¹⁰⁹ are the leading cases in which courts held that CERCLA response costs constitute equitable relief rather than legal damages. In *Armco*, the Fourth Circuit held that claims against the insured by the government for injunctive relief and restitution in the form of reimbursement of clean-up costs were not claims for legal damages but were claims for equitable relief.¹¹⁰ In that case, Maryland Casualty Co. brought a declaratory judgment action against Armco. The insurer claimed that it had no duty to defend a CERCLA suit filed for reimbursement of costs incurred to cleanup the seepage of toxic chemicals into the soil and groundwater surrounding a hazardous waste site.¹¹¹ The insurer based its claim on a narrow interpretation of the "as damages" clause.

The court in *Armco* adopted a narrow interpretation of the term, drawing a distinction between legal damages and equitable monetary relief.¹¹² In adopting the narrow interpretation of damages, the court in *Armco* drew upon the Fifth Circuit's decision in *Aetna Casualty & Surety Co. v. Hanna*.¹¹³ The court in *Hanna* held that the term "damages" has an "accepted technical meaning in law" which is limited only to payments to third persons, such as awards in suits at law against the insured for money damages.¹¹⁴ Although *Armco* and many other courts rely on *Hanna* to define the term "damages" within CGL policies, in fact, *Hanna* did not involve a claim under a CGL policy. Rather, in *Hanna*, the policyholders of a comprehensive personal liability insurance policy sued their insurer to recover the costs of compliance with a mandatory injunction requiring the insureds to remove rocks and dirt from adjoining property.¹¹⁵ The Fifth Circuit reversed the trial

107. *Id.* at 986-87.

108. 822 F.2d 1348 (4th Cir. 1987), *cert. denied*, 484 U.S. 1008 (1988).

109. 842 F.2d 977 (8th Cir.), *cert. denied*, 488 U.S. 821 (1988).

110. *Armco*, 822 F.2d at 1354.

111. *Id.* at 1350.

112. *Id.* at 1352-53.

113. 224 F.2d 499 (5th Cir. 1955). The court in *Hanna* argued:

[c]learly, the policy covers only payments to third parties when those persons have a legal claim for damages against the insured on account of injury to or destruction of property." *Id.* at 502.

114. *Id.* at 503.

115. *Id.* at 501.

court's award of damages, finding that the insurance policy did not provide coverage for compliance with a mandatory injunction.¹¹⁶ The insurer, the court held, was obligated "to pay," and not to comply with a mandatory injunction.¹¹⁷

The *Armco* court concluded that under the *Hanna* definition of damages, claims for reimbursement under CERCLA section 107 (a)(4)(A) are not claims for legal damages.¹¹⁸ This result, the court determined, turned on the form of relief sought, which is equitable, and not on the nature of the underlying action.¹¹⁹ Thus, under the *Hanna* court's definition, restitutionary relief and the cost of compliance with mandatory injunctions by government agencies are not damages.¹²⁰

In *NEPACCO*, in a sharply divided *en banc* opinion, the Eighth Circuit adopted the narrow interpretation of damages used by the court in *Armco*.¹²¹ In *NEPACCO*, the EPA cleaned up dioxin contamination, generated by NEPACCO at Times Beach, Missouri. NEPACCO's insurer brought suit seeking a declaration that the insurer had no duty to indemnify the company for the costs incurred to clean up the toxic contamination.¹²²

The court in *NEPACCO*, unlike the court in *Armco*, recognized that, outside the context of the insurance industry, the term "damages" is an ambiguous term that could include both legal and equitable remedies.¹²³ Despite the court's recognition that the plain meaning of damages may incorporate both legal and equitable forms of relief, the court argued that, in the

116. *Id.* at 503.

117. *Id.* at 502.

118. 822 F.2d at 1352.

119. *Id.* at 1352; The *Armco* court argued that it is a "dangerous" step for courts to construe insurance policies to include the costs of compliance with injunctive and reimbursement relief. *Id.* at 1353. Insurers, the court stressed, are reluctant to insure prophylactic measures because such expenses are subject to the insured's discretion and are not connected with harm to third parties. *Id.* The *Armco* court held that because the government cleaned up the waste in order to prevent harm, the costs were prophylactic in nature, and thus, did not fall within the terms of the CGL policy. *Id.* at 1354.

120. *Armco*, 822 F.2d at 1352.

121. *NEPACCO*, 842 F.2d 977 (8th Cir.), *cert. denied*, 488 U.S. 821 (1988).

122. *See id.* at 981.

123. *Id.* The *NEPACCO* court noted that "[v]iewed outside the insurance context, the term 'damages' is ambiguous: it is reasonably open to different constructions. . . . Thus, from the viewpoint of the lay insured, the term 'damages' could reasonably include all monetary claims, whether such claims are described as damages, expenses, costs, or losses." *Id.* at 985.

insurance context, the term "damages" is not ambiguous.¹²⁴ Rather, the court concluded that "damages" in an insurance context refers to legal damages and does not include equitable monetary relief.¹²⁵ The *NEPACCO* court adopted the *Hanna* definition of damages.¹²⁶ Moreover, the court determined that this limited construction of the term "damages" is consistent with the statutory scheme of CERCLA which, according to the court, differentiates between recovery for clean-up costs under section 107(a)(4)(A) and recovery for injury to natural resources under section 107(a)(4)(C).¹²⁷ This distinction, the court reasoned, is critical in the determination of the insurer's liability because CGL policies only cover legal damages, such as injury to property, but not equitable actions for monetary relief.¹²⁸

The courts in *Armco*, *NEPACCO*, and their progeny reason that the narrow interpretation of damages is consistent with the language and structure of CGL policies.¹²⁹ These courts argue that under a CGL policy, the insurer is liable only for amounts the insured becomes obligated to pay *as damages*; the insurer is not liable for *all* sums the insured may be obligated to pay. Consequently, these courts maintain that under an expansive interpretation of damages, incorporating both legal and equitable relief, the term "damages" would become "mere surplusage" because any obligation to pay would be covered.¹³⁰

Courts like those deciding *Armco* and *NEPACCO* conclude that a narrow interpretation of the term "damages" is essential

124. *Id.* at 986.

125. *Id.* at 985 (citing *Armco*, 822 F.2d at 1352.).

126. *Id.* at 985-86. By contrast, the dissent in *NEPACCO* determined that a narrow definition of damages is inconsistent with Missouri law, which requires a reasonable-layperson construction of insurance policies. *Id.* at 988 (Heaney, J., Lay, C.J., Fagg, J., dissenting). Under this construction, the term "damages" includes the costs of restoring real property to its predamaged condition. *Id.* In addition, the dissent criticized the majority for following the *Armco* decision, which concluded that the narrow definition of damages is inconsistent with Maryland law. *Id.* at 989.

127. *Id.* at 987.

128. *See id.* at 987.

129. *Maryland Casualty Co. v. Armco*, 822 F.2d 1348, 1352 (4th Cir. 1987), *cert. denied*, 484 U.S. 1008 (1988); *NEPACCO*, 842 F.2d at 986.

130. The *Armco* court reasoned as follows:

If the term "damages" is given the broad, boundless connotations sought by the [insurer], then the term "damages" in the contract between Maryland Casualty and *Armco* would become mere surplusage, because any obligation to pay would be covered. The limitation implied by employment of the phrase "to pay as damages" would be obliterated.

Armco, 822 F.2d at 1352.

to provide insurers with certainty regarding the extent of their potential liability.¹³¹ To accurately assess the risks of providing pollution-related insurance coverage, insurers must judge the potential liability from pollution releases. CERCLA's strict joint and several liability provisions make response costs highly uncertain because a responsible party may be held liable for a greater percentage of clean-up costs than the actual proportion of waste attributed to that party. This results in a great deal of uncertainty in estimating CERCLA liability; therefore, according to these courts, CERCLA clean-up costs are essentially uninsurable. Thus, these courts maintain that insurers should not be required to provide coverage for uninsurable costs.

The issue of whether CGL policies provide coverage for CERCLA response costs is largely determined by a court's adoption of either a broad or a narrow interpretation of the term "damages." The historical distinction between legal and equitable remedies has created these two disparate interpretations of the term "damages." Until recently, this distinction has been a focal point of litigation in the federal courts surrounding the "as damages" clause of CGL policies. Now, however, federal courts are beginning to look to state courts to provide them with an interpretation of state law on this issue. State courts increasingly are focusing on state contract law, as opposed to the distinction between legal and equitable remedies, to determine whether CERCLA response costs are covered by CGL policies as interpreted by state law.

IV. WASHINGTON STATE LAW

Prior to the Washington Supreme Court's recent decision in *Boeing Co. v. Aetna Casualty & Surety Co.*, Washington law on the "as damages" issue was sparse and divided. Two Washington trial courts held that response costs were covered by CGL policies in *Queen City Farms, Inc. v. Aetna Casualty & Surety Co.*¹³² and *Isaacson Corp. v. Holland-America Insurance Co.*¹³³ In contrast, in *Travelers Insurance Co. v. Ross Electric of Washington, Inc.*,¹³⁴ the United States District Court for the

131. *Id.* at 1353.

132. No. 86-2-06236-0 (King County Super. Ct. Sept. 4, 1987), reported in Mealey's Litigation Reports—Insurance A-106, A-108 (Nov. 24, 1988).

133. No. 85-2-12843-5 (King County Super. Ct. Dec. 22, 1987).

134. 685 F. Supp. 742 (W.D. Wash. 1988) (purporting to apply Washington law).

Western District of Washington held that clean-up costs are an equitable remedy, not a legal remedy, and thus are not covered under a CGL policy.¹³⁵

In *Queen City Farms*, the insured, Queen City Farms, sought a declaration of coverage under a CGL policy for the cost of cleaning up hazardous materials that created an imminent and substantial endangerment to public health. The King County Superior Court denied the insurer's motion for summary judgment, holding that reimbursement to the EPA for its cleanup of the hazardous material was covered as damages under Queen City's CGL policies.¹³⁶ The court reasoned that the term "damages" in a CGL policy should be interpreted according to the Washington law of insurance construction,¹³⁷ which requires interpretation of an insurance policy according to the understanding of the average insurance buyer.¹³⁸ Because the average purchaser of a CGL policy would reasonably conclude that the policy's coverage included monies paid to clean up pollution damage, the judge deciding *Queen City Farms* concluded that CERCLA clean-up costs are covered damages under a CGL policy.¹³⁹

Similarly, in *Isaacson*, the Isaacson Corporation sought reimbursement from its insurance carrier for costs the company incurred in cleaning up contaminated soil and groundwater on company property. The *Isaacson* court held that the distinction between legal and equitable remedies is irrelevant to the issue of coverage. Moreover, it rejected the analysis used by the courts in *Armco* and *NEPACCO* to adopt the broad definition of damages.

Conversely, the district court in the case of *Travelers Insurance Co. v. Ross Electric of Washington, Inc.*¹⁴⁰ adopted the narrow interpretation of the term "damages" articulated in *Armco* and *NEPACCO*. In *Ross*, land leased to Ross Electric was contaminated by pollution from the operation of Ross's business.¹⁴¹ The district court granted the Travelers' motion for partial summary judgment, holding that CERCLA response

135. *Id.* at 744.

136. *Queen City Farms*, Mealey's Litigation Reports — Insurance at A-109 (Nov. 24, 1986).

137. *Id.*

138. *Id.*

139. *Id.*

140. 685 F. Supp. 742 (W.D. Wash. 1988).

141. *Id.* at 743.

costs pursuant to section 107(a)(4)(A) are an equitable remedy which is not within the class of risks insured "as damages" under the CGL policies issued by the insurer.¹⁴² The Travelers' motion presented two issues: whether CERCLA response costs are legal or equitable remedies and whether the term "property damage" within the CGL policy in question is analogous to property damage for which legal damages attach.¹⁴³

Under the first issue, the court in *Ross* noted that relief under CERCLA is generally considered to be equitable in nature.¹⁴⁴ Specifically, the court adopted the analysis of the Fourth Circuit in *Armco* that the determinative factor in ascertaining whether response costs are equitable or legal damages is based upon the form of relief sought, not the nature of the underlying action.¹⁴⁵ In *Ross*, the court reasoned that the response costs incurred by the insured are analogous to restitution or the reestablishment of the environmental status quo.¹⁴⁶ By contrast, damages are traditionally viewed as a monetary substitution for a loss in value.¹⁴⁷ Thus, the court in *Ross* concluded that claims for injunctive or equitable monetary relief, such as CERCLA response costs pursuant to CERCLA section 107(a)(4)(A), are not covered risks within the meaning of a CGL policy.¹⁴⁸ Under the second issue, the court argued that the term "damages" within the CGL policy should be given its "accepted technical meaning in law," which is limited to strictly legal damages.¹⁴⁹ The court in *Ross* concluded that because CERCLA response costs are equitable in nature, CGL policies do not cover such costs.¹⁵⁰

These divergent judicial interpretations of an insurer's liability provided a confusing and disparate legal foundation for the Washington Supreme Court's recent decision in *Boeing Co.*

142. *Id.* at 743.

143. *Id.*

144. *Id.* at 744.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 745, (citing *Aetna Casualty & Sur. Co. v. Hanna*, 224 F.2d 499, 503 (5th Cir. 1955); *Continental Ins. Co. v. Northeastern Pharmaceutical & Chem. Co.*, 842 F.2d, 977, 985 (8th Cir. 1988)).

150. *Id.* at 745.

This conclusion gives meaning to the language of the insurance policy limiting coverage to *damages* for which the insured has become *legally obligated*, and to the intentions of the parties regarding risks covered.

Id. (citing *Allstate Ins. Co. v. Neel*, 25 Wash. App. 722, 724, 612 P.2d 6, 7-8 (1980)).

*v. Aetna Casualty & Surety Co.*¹⁵¹ In *Boeing*, the Washington Supreme Court squarely addressed the issue of whether CERCLA response costs are covered within the "as damages" clause of CGL policies. In a 6-2 ruling, the court rejected the narrow interpretation of the term "damages" adopted in *Ross* and, like the courts in *Queen City Farms* and *Isaacson*, looked to the Washington law of insurance construction to find that terms in an insurance contract must be interpreted broadly and in accordance with their plain meaning.

V. *BOEING CO. V. AETNA CASUALTY AND SURETY CO.*

In *Boeing*, Boeing and the other policyholders¹⁵² sued their insurers in the United States District Court for the Western District of Washington for indemnification for the response costs the companies paid to the EPA for clean up of the Western Processing Facility. Both sides filed motions for summary judgment. Because the motions raised a determinative question of state law, the district court certified the case to the Washington Supreme Court for a determination of whether CERCLA response costs are covered damages under CGL policies.¹⁵³ The majority in *Boeing* explicitly rejected the narrow interpretation of the term "damages" and held that response costs paid to the EPA are "damages" under the CGL policies issued by Boeing's insurers.¹⁵⁴ To reach this conclusion, the majority reasoned that response costs must be within the plain meaning of the insurance policy before a policyholder would be entitled to indemnification from its insurer.¹⁵⁵ Thus, in its well

151. 113 Wash. 2d 869, 784 P.2d 507 (1990).

152. Six cases stemming from hazardous waste contamination at the Western Processing Facility in Kent, Washington, were consolidated. *Boeing Co. v. Aetna Casualty & Sur. Co.* (consolidating *Northwest Steel Rolling Mills, Inc. v. Fireman's Fund Ins. Co.*; *RSR Co. v. Granite State Ins. Co.* and *American Centennial Ins. Co.*; *John Fluke Manufacturing Co., v. Hartford Accident & Indem. Co.*; *Hartford Accident & Indem. Co. v. John Fluke Manufacturing Co.*; *Davis Walker Co. v. Aetna Casualty & Sur. Co.*).

153. *Id.* at 873, 784 P.2d at 509. The district court certified the following question to the supreme court: "Whether, under Washington law, the environmental response costs paid or to be paid by the insureds, as the result of action taken by the United States and the State of Washington under CERCLA, 42 U.S.C. § 9601 *et. seq.*, constitute 'damages' within the meaning of the comprehensive general liability policies issued by the insureds."

154. *Id.* at 887, 784 P.2d at 516.

155. *Id.* at 875, 784 P.2d at 510. The court applied a particularly objective test to determine the plain meaning of the insurance policy and specifically noted the absence of public policy in the construction of insurance contracts:

While this case implicitly presents a grave question of policy, namely who

reasoned opinion, the court adopted the primary method of analysis used by courts that have found in favor of coverage: the plain meaning rule.¹⁵⁶

To determine whether response costs should be considered damages within the CGL policy, the Washington Supreme Court first analyzed the structure of the policy itself.¹⁵⁷ Because the policies in question contained variations on the standard "as damages" language, the court looked within the document for a definition of the term "damages." Neither the exclusionary clause nor the definition section clarified the term. After determining that the term "damages" was not defined within the four corners of the insurance policy, the majority turned to the plain meaning rule to provide a definition.¹⁵⁸

Citing the commonly accepted pronouncement of the plain meaning rule, the court stated that undefined terms in an insurance contract are given their plain, ordinary, and popular meaning.¹⁵⁹ The majority noted that the plain meaning of a term is determined by its standard dictionary definition. Standard dictionaries, the majority found, uniformly define the word "damages" inclusively, without making any distinction between sums awarded on a legal or equitable basis.¹⁶⁰ Because standard dictionaries do not limit damages to legal remedies, the majority concluded that the plain meaning of the term "damages" includes both legal and equitable claims for

should bear the cost of polluting our environment, the task presently before this court only requires us to construe the terms of the policies under Washington law. Washington courts rarely invoke public policy to override express terms of an insurance policy.

Id. at 876, 784 P.2d at 510 n.1.

156. *Id.* at 876-77, 784 P.2d at 511. For a discussion of the two methods of analysis most frequently employed by courts finding in favor of coverage, see *supra* text accompanying notes 73-100. Although the court in *Boeing* relied on the plain meaning rule, it did give passing notice to the reasoning that the distinction between legal damages and equitable relief is irrelevant. The court explicitly cited the ruling in *United States Aviax Co. v. Travelers Ins. Co.*, 125 Mich. App. 579, 336 N.W.2d 838 (1983), which chided the fortuitous distinction between whether the state cleans up and sues to recover clean-up costs or whether it compels the polluter to incur clean-up costs. *Boeing*, 113 Wash. 2d at 879, 784 P.2d at 512.

157. *Id.* at 876-77, 784 P.2d at 511.

158. *Id.* at 877, 784 P.2d at 511.

159. *Id.* at 877, 784 P.2d at 511.

160. *Id.* at 877, 784 P.2d at 511. In fact, even the insurers own dictionaries defined "damages" in accordance with the ordinary, popular, lay understanding. *Id.* at 877-78, 784 P.2d at 511.

relief.¹⁶¹

By adopting the plain meaning analysis, the majority in *Boeing* rejected the narrow interpretation of the term "damages" and the various case law that supports that definition. The majority noted that virtually all previous courts finding against coverage relied on the narrow, technical interpretation of damages first established by the Fifth Circuit in *Aetna Casualty & Surety Co. v. Hanna*.¹⁶² In *Boeing*, the majority argued that the *Hanna* interpretation of damages is inconsistent with Washington law.¹⁶³ As the majority explained, Washington law prohibits imputing a technical definition to a contract term unless both parties intended the term to have such a meaning.¹⁶⁴ Unless the parties otherwise agree, courts interpret a word in an insurance contract in accordance with the meaning the average insurance purchaser would give the word.¹⁶⁵ The text of Boeing's insurance contract contained no indication that the parties intended the term "damages" to have any definition other than its ordinary definition.¹⁶⁶ Because the policy did not indicate any contrary intent of the parties, the *Boeing* majority held that the standard dictionary definition of damages should be applied to the contract.¹⁶⁷ The majority held that a narrow, technical definition was inappropriate.¹⁶⁸

Although the court rejected the narrow interpretation of damages as promulgated by *Hanna* and its progeny, the insurers insisted that the district court's decision in *Ross*¹⁶⁹ established a Washington precedent sufficient to compel the court

161. *Id.* at 885, 784 P.2d at 515.

162. 224 F.2d 499 (5th Cir. 1955).

163. *Boeing*, 113 Wash. 2d at 880, 784 P.2d at 512.

164. *Id.* at 881-82, 784 P.2d at 513.

165. *Id.* at 882, 784 P.2d at 513.

166. Upon certification to the Washington Supreme Court, the district court intended only that the state court answer a question of Washington law; therefore, the district court did not provide any extrinsic evidence touching upon the parties' interpretation of the coverage clause. Thus, the court's analysis was limited to the four corners of the insurance policy. *Id.* at 877, 784 P.2d at 511. Even if extrinsic evidence had been available, it is likely that the court would have ruled it inadmissible, because generally, extrinsic evidence will not be admitted into evidence unless the term is ambiguous. 19 G. COUCH CYCLOPEDIA OF INSURANCE LAW § 79: 143 at 118-19 (2d ed. 1984). Given the court's analysis in this case, it is very likely that it would have determined that the term "damages" is unambiguous; therefore, any evidence of the parties' intent outside the insurance policy document would have been inadmissible.

167. *Id.* at 876-77, 784 P.2d at 511.

168. *Id.*

169. *Travelers Ins. Co. v. Ross Electric of Washington, Inc.*, 685 F. Supp. 742 (W.D. Wash. 1988).

to find that a claim for equitable monetary relief cannot constitute a claim for damages.¹⁷⁰ The court rejected this argument as well. In reaching its decision, the court in *Ross* relied on *Hanna* progeny (the reasoning of which had already been rejected by the *Boeing* court), and on a single case interpreting Washington insurance law. According to the majority, that case, *Seaboard Surety Co. v. Ralph Williams' Northwest Chrysler Plymouth, Inc.*,¹⁷¹ did not stand for the proposition for which it was cited by the insurers.

The court in *Ross* and the insurers in *Boeing* interpreted *Seaboard* as holding that "damages" do not include sums paid as restitution.¹⁷² In *Seaboard*, the Seaboard Surety Company brought a declaratory judgment action to obtain a judicial determination that the company had no duty to defend an injunction suit filed by the Washington State Attorney General against an automobile dealer for unfair competition.¹⁷³ The court in *Seaboard* upheld the trial court's determination that the insurer was under no contractual duty to defend the suit because the complaint did not allege damages for unfair competition and the Attorney General was not authorized by state statute to recover such costs.¹⁷⁴

Not only did the *Boeing* majority reject the *Ross* court's interpretation of *Seaboard*, it found that the *Ross* decision was of dubious precedential value because the district court was unaware of the decisions in *Queen City Farms* and *Isaacson* when it made its ruling. After these decisions were brought to the district court's attention on a motion for rehearing, the insurer settled the case before the motion was resolved.¹⁷⁵ Thus, the *Boeing* court concluded that not only did the court in *Ross* misapply the Washington law on which it relied, it also decided the case without the benefit of the reasoning of the only Washington court to have addressed the interpretation of

170. *Boeing*, 113 Wash. 2d at 883, 784 P.2d at 514.

171. 81 Wash. 2d 740, 504 P.2d 1139 (1973). The *Boeing* majority also distinguished a Washington Court of Appeals decision, *Felice v. St. Paul Fire & Marine Ins. Co.*, 42 Wash. App. 352, 711 P.2d 1066 (1985), *review denied*, 105 Wash. 2d 1014 (1986), upon which the *Ross* court relied. See *Boeing*, 113 Wash. 2d at 895, 784 P.2d at 515 n.4. *Felice*, the majority reasoned, involved a proceeding to remove an attorney as guardian of an estate, and not an action to recover damages. *Id.* Accordingly, the majority concluded that the *Felice* decision is distinguishable on the facts. *Id.*

172. *Boeing*, 113 Wash. 2d at 884, 784 P.2d at 514.

173. *Seaboard*, 81 Wash. 2d at 740-41, 504 P.2d at 1140.

174. *Id.* at 746-47, 504 P.2d at 1143.

175. *Boeing*, 113 Wash. 2d at 885, 784 P.2d at 515.

the "as damages" clause of CGL policies.¹⁷⁶

Having dismissed the insurers' bases for arguing that a narrow interpretation of the term "damages" is appropriate under Washington law, the majority concluded that "the plain meaning of damages does not distinguish between sums awarded on a 'legal' or 'equitable' basis and that the plain meaning of damages may include clean-up costs"¹⁷⁷ As the *Boeing* majority noted, the issue of whether CERCLA response costs are damages within the meaning of a CGL policy is solely a matter of state contract law.¹⁷⁸ Washington contract law follows the established principle that clear and unambiguous language in an insurance contract must be interpreted in accordance with the definition that an *average* person in the position of the insured would have understood the language to mean.¹⁷⁹ Such an interpretation is a fair, reasonable construction¹⁸⁰ in accordance with the ordinary meaning of the term.¹⁸¹ This definition upholds the insured's reasonable expectations as to the scope of coverage.¹⁸² However, even if the term "damages" is ambiguous, or susceptible to two reasonable and fair interpretations,¹⁸³ Washington law requires the term to be construed in the manner most favorable to the

176. *Id.*

177. *Id.*

178. *Id.* at 875, 784 P.2d at 510 n.1; *Travelers Ins. Co. v. Ross Electric of Washington, Inc.*, 685 F. Supp. 742 (W.D. Wash. 1988) ("interpretation of the terms of [CGL] insurance contract is governed by Washington law"); *Hazen Paper Co. v. U.S. Fidelity & Guar. Co.*, 555 N.E.2d 576 (Mass. 1990) (issue of whether CERCLA clean-up costs are damages is one of state law). See generally, 2 G. Couch, CYCLOPEDIA OF INSURANCE LAW § 15:3, at 116 (2d ed. 1984) (as a general rule, construction of an insurance contract is a matter of law.).

179. *State Farm Gen. Ins. Co. v. Emerson*, 102 Wash. 2d 477, 480, 687 P.2d 1139, 1142 (1984); *Phil Schroeder, Inc. v. Royal Globe Ins.*, 99 Wash. 2d 65, 68, 659 P.2d 509, 511 (1983). Washington courts apply the average layperson standard irrespective of the insured's expertise in the interpretation of insurance contracts. Under the layperson standard, the language of an insurance policy is not given a technical interpretation unless the parties clearly intended the policy language to have a technical meaning. *Thompson v. Ezzell*, 61 Wash. 2d 685, 688, 379 P.2d 983, 985 (1963); *Zinn v. Equitable Life Ins. Co.*, 6 Wash. 2d 379, 381, 107 P.2d 921, 924 (1940). Technical constructions of policy terms are not favored. 2 G. COUCH CYCLOPEDIA OF INSURANCE, at § 15:22, 201-202 (2d ed. 1984).

180. *Phil Schroeder, Inc. v. Globe Ins. Co.*, 99 Wash. 2d 65, 68, 659 P.2d 509, 511 (1983); *Morgan v. Prudential Ins. Co.*, 86 Wash. 2d 432, 434, 545 P.2d 1193, 1195 (1976).

181. *Ames v. Baker*, 68 Wash. 2d 713, 716, 415 P.2d 74, 76 (1966). *Thompson v. Ezzell*, 61 Wash. 2d 685, 688, 379 P.2d 983, 985 (1963); *Selective Logging Co. v. General Casualty Co. of America*, 49 Wash. 2d 347, 351, 301 P.2d 535, 537 (1956).

182. *Morgan v. Prudential Ins. Co.*, 86 Wash. 2d 432, 545 P.2d 1193 (1976).

183. *Emerson*, 102 Wash. 2d at 484, 687 P.2d at 1144; *Morgan*, 86 Wash. 2d at 435, 545 P.2d at 1195.

insured.¹⁸⁴ Accordingly, Washington law requires that the term "damages" within CGL policies must be interpreted broadly.

The Washington Supreme Court's decision in *Boeing* is consistent with the Washington law of insurance construction and with the policies underlying CERCLA. Insurers have attempted to limit their liability for pollution-related clean-up costs by creating an artificial distinction between legal damages and equitable relief. This distinction, however, is not only inconsistent with Washington insurance law, it creates needless litigation over abstract terms in insurance policies and undermines the purposes of CERCLA. Although the court in *Boeing* correctly interpreted Washington law by finding that CERCLA clean-up costs are covered damages, the dissent raises some compelling arguments that reflect the reasoning of courts that deny coverage. Upon close examination, however, the dissent's analysis relies on a misinterpretation of Washington contract law to support its reasoning.

VI. THE *BOEING* DISSENT: A MISINTERPRETATION OF WASHINGTON LAW

Chief Justice Callow, joined by Justice Dolliver, wrote a vigorous dissent arguing that reimbursement of clean-up costs is not damages within the meaning of the CGL policies in question.¹⁸⁵ The dissent concluded that CERCLA response costs are restitutionary in nature, and as such, cannot be considered damages.¹⁸⁶ Chief Justice Callow argued that the majority's finding that such costs are considered damages upsets the rules of insurance construction and violates precedent.¹⁸⁷ The dissent reasoned that Washington law limits recovery for property damage to the amount necessary to adequately compensate the injured parties for the loss.¹⁸⁸ Restitutionary recovery, on the other hand, is based upon a benefitted party's

184. *Thompson*, 61 Wash. 2d 685, 688, 379 P.2d 983, 985 (quoting *Selective Logging Co. v. General Casualty Co. of America*, 49 Wash. 2d 347, 351, 301 P.2d 535, 537 (1956)). See also *Morgan*, 86 Wash. 2d at 435, 545 P.2d at 1195 (citing *Glen Falls Ins. Co. v. Vietzke*, 82 Wash. 2d 122, 508 P.2d 608 (1973)); *Zinn*, 6 Wash. 2d at 384, 107 P.2d at 924.

185. *Boeing Co. v. Aetna Casualty & Sur. Co.*, 113 Wash. 2d 869, 888, 784 P.2d 507, 516-17 (1990) (Callow, C.J. and Dolliver, J., dissenting).

186. *Id.* at 890, 784 P.2d at 518.

187. *Id.* at 888, 784 P.2d at 517.

188. *Id.* at 889, 784 P.2d at 517 (citing *Puget Const. Co. v. Pierce Cty.*, 64 Wash.2d 453, 392 P.2d 227 (1964)).

gain.¹⁸⁹ Such recovery, according to the dissent, can greatly exceed the value of harmed property.¹⁹⁰

Using the distinction between damages and restitutionary recovery as a framework, the dissent analyzed the nature of recovery under CERCLA.¹⁹¹ First, the dissent articulated two methods of recovery under CERCLA: section 107(a)(4)(C) and section 107(a)(4)(A).¹⁹² According to the dissent, CERCLA section 107(a)(4)(C), which provides for recovery resulting from injury to natural resources, is a compensatory remedy based on "the lesser of the restoration or replacement costs; or diminution of use values."¹⁹³ By contrast, the dissent argued that the recovery of response costs under section 107(a)(4)(A) is restitutionary in nature¹⁹⁴ because this subsection provides for the restoration of the status quo.¹⁹⁵

The distinctions in CERCLA between the recovery for injury to natural resources and the recovery of response costs, the dissent reasoned, indicate that response costs under section 107(a)(4)(A) are an equitable rather than a compensatory, or legal, remedy.¹⁹⁶ The dissent based this conclusion on the restitutionary features of recovery under section 107(a)(4)(A). First, the dissent argued that liability for response costs is not dependent upon the occurrence of a release of hazardous substances, but may precede such a release.¹⁹⁷ Second, it found that parties may maintain actions for response costs without an ownership interest in the injured property.¹⁹⁸ Finally, the dissent stated that response costs can greatly exceed the value of the harmed property.¹⁹⁹

Based on these findings, and the apparent contrast between natural resource damages and response costs, the dissent concluded that response costs are an equitable remedy. Accordingly, the dissent then analyzed the coverage provisions

189. *Id.*

190. *Id.* at 890, 784 P.2d at 517.

191. *Id.* at 890-92, 784 P.2d at 517-19.

192. *See supra* note 44.

193. *Boeing*, 113 Wash. 2d at 891, 784 P.2d at 518 (citing 43 C.F.R. 11.35(6)(2)).

194. *Id.* at 891-92, 784 P.2d at 518.

195. *Id.* at 891, 784 P.2d at 518 (quoting Brett, *Insuring Against the Innovative Liabilities and Remedies Created by Superfund*, 6 J. ENVTL. L. 1, 35 (1986)).

196. *Id.* at 892, 784 P.2d at 518.

197. *Id.* at 892, 784 P.2d at 518 (citing 42 U.S.C. § 9604).

198. *Id.* (citing 42 U.S.C. § 9607(a)(4)(B), 9659 (a)).

199. *Id.* (citing Abraham, *Environmental Liability and the Limits of Insurance*, 88 COLUM. L. REV. 942, 969 (1988)).

of typical CGL policies to ascertain whether the policies in question cover both legal and equitable remedies. In its analysis, the dissent determined that the CGL policies at issue unambiguously cover only compensatory damage liability and do not cover restitutionary response cost liability.²⁰⁰ Based on these conclusions, the dissent then proceeded to parse the reasoning of the majority, ultimately determining that the majority had misinterpreted Washington law.

First, the dissent attacked the majority's finding that the policyholder's subjective understanding of the coverage provided by CGL policies is determinative of the coverage actually provided.²⁰¹ The dissent argued that the clear meaning and purpose of an insurance policy rather than the insured's expectation of coverage, should determine coverage.²⁰² The dissent drew this conclusion after interpreting several Washington Supreme Court decisions as having ignored the insured's subjective expectation of coverage.²⁰³ Based on this interpretation of Washington law, the dissent concluded that an insured's subjective understanding of the scope of the "as damages" clause is irrelevant.²⁰⁴

Second, the dissent argued that the Washington Supreme Court explicitly rejected structural ambiguity as a doctrine of contract interpretation.²⁰⁵ Rather, the dissent contended that the absence of exclusionary language limiting the scope of damages indicates that the policies extended coverage only to amounts the insurer is legally obligated to pay "as damages."

Finally, the dissent argued that, within the CGL policies issued by Aetna and the other insurers, the phrase "as damages" plainly refers to compensation for injuries.²⁰⁶ According to the dissent, although the standard dictionary definition of damages does not distinguish between legal and equitable relief, the definition establishes "damages" as reparation for detriment or injury sustained.²⁰⁷ Because CERCLA response costs under section 107(a)(4)(A) do not constitute reparation,

200. *Id.* at 893, 784 P.2d at 519.

201. *Id.* at 894, 784 P.2d at 519.

202. *Id.* at 894, 784 P.2d at 519-20.

203. *Id.* (citing *Kennen v. Industrial Indem. Ins. Co. of the Northwest*, 108 Wash.2d 514, 522, 738 P.2d 270 (1987)) (standing for the proposition that the court has on several occasions declined to adopt the doctrine of reasonable expectations).

204. *Id.* at 894, 784 P.2d at 520.

205. *Id.*

206. *Id.*

207. *Id.* at 896, 784 P.2d at 521.

the dissent concluded that these costs do not fall within the plain meaning of damages.²⁰⁸

Having rejected the majority's analysis of Washington contract law, the dissent attacked the majority's dismissal of *Seaboard Surety Company v. Ralph Williams Northwest Chrysler Plymouth, Inc.*²⁰⁹ The majority rejected the insurer's argument that *Seaboard* stands for the proposition that, under Washington law, the term "damages" does not include restitutionary liabilities.²¹⁰ The dissent argued that *Seaboard* stands for the proposition that an action for injunctive and restitutionary relief is not an action for damages.²¹¹ Accordingly, the dissent found that the EPA's recovery of response costs under CERCLA is a restitutionary form of recovery, and as such, does not fall within the "as damages" language of typical CGL policies.²¹²

Although the dissent constructed a compelling argument in favor of denying coverage, it misinterpreted the meaning of the term "damages" under Washington law by misconstruing Washington case law and by failing to apply the state's law of insurance construction. The dissent relied on the holding in *Puget Construction Co. v. Pierce County*²¹³ to support this conclusion that Washington law has uniformly adopted a narrow interpretation of the term "damages."²¹⁴ The dissents reading of *Puget Construction*, however, was erroneous. In *Puget Construction* the court adopted the narrow interpretation of damages only to comply with Wash. Rev. Code § 36.45, which provides for claims against counties. In that case, the court addressed the issue of whether the term "damages" within the

208. *Id.*

209. 81 Wash. 2d 740, 504 P.2d 1139 (1973). See *supra* notes 171-174 and accompanying text.

210. *Boeing*, 113 Wash. 2d at 901, 784 P.2d at 523.

211. *Id.*

212. *Id.* The dissent argued that the Washington Court of Appeals has found that an insurer is not required to indemnify an insured's restitutionary liability. *Id.* at 902, 784 P.2d at 524 (citing *Felice v. St. Paul Fire & Marine Ins. Co.*, 42 Wash. App. 352, 357, 711 P.2d 1066 (1985), *review denied*, 105 Wash. 2d 1014 (1986)). In *Felice*, an attorney sought coverage of attorney fees for breach of the insurer's duty to defend the attorney in an action to remove him as guardian of an estate. *Felice*, 42 Wash. App. at 356, 711 P.2d at 1068. The Washington Supreme Court determined that the insurer is not required to defend an insured for mandamus or injunction types of proceedings which compel the insured to act. *Id.* at 357, 711 P.2d at 1069 (citing *Seaboard*, 81 Wash. 2d 740, 504 P.2d 1139 (1973)).

213. 64 Wash. 2d 453, 392 P.2d 227 (1964).

214. *Boeing*, 113 Wash. 2d at 889, 784 P.2d at 517.

meaning of the statute included claims arising out of both tort and contract.²¹⁵ The court determined that the statute defined damages as the sum of money that the law imposes or awards as compensation for injury done, under either tort or contract.²¹⁶ Because the *Puget Construction* court's narrow definition of the term "damages" was limited to the terms remaining within that particular statute, the *Boeing* dissent erred in attempting to apply that definition in the context of response costs under CERCLA.

The dissent also misinterpreted Washington law by declining to interpret insurance contracts in a manner consistent with the expectations of the average insured. Specifically, the dissent cited *Nevers v. Aetna Insurance Co.*²¹⁷ to support its contention that coverage under an insurance policy does not correspond to the coverage the insured anticipated, but rather should be interpreted in accordance with "its clear meaning and purpose. . . ."²¹⁸ *Nevers*, however, is distinguishable on its facts. In *Nevers*, the plaintiff sought indemnification under an "all risks" yachtsman's hull insurance policy to recover the cost of a boat which had a defective title.²¹⁹ The plaintiff's insurance company interpreted the policy as limiting recovery to damage to, or physical loss of, the boat caused by fortuitous and external circumstances but determined that it did not cover losses incurred through breach of the warranty of title.²²⁰

The *Nevers* court held that construing the policy in such a manner, therefore, the court concluded that coverage did not extend to defects of title.²²¹ Thus, the *Nevers* decision does not abandon the practice of interpreting the meaning of the terms of an insurance policy by looking to the insured's reasonable expectations of coverage. Rather, the *Nevers* decision was limited strictly to the facts of that particular case. Given those particular facts, the plaintiff in *Nevers* could not have reasonably anticipated coverage.²²²

215. *Puget Construction*, 64 Wash. 2d at 454, 392 P.2d at 228.

216. *Id.* at 392, P.2d at 230.

217. 14 Wash. App. 906, 546 P.2d 1240 (1976).

218. *Boeing*, 113 Wash. 2d at 894, 784 P.2d at 519-20.

219. *Nevers*, 14 Wash. App. at 907, 546 P.2d at 1240.

220. *Id.* at 907, 546 P.2d at 1240-41.

221. *Id.* at 903, 546 P.2d at 1241.

222. While a phrase in an insurance policy must be interpreted in accordance with the way it would be understood by the average man purchasing insurance, . . . the phrase should not be isolated and construed by itself without reference to its context

In their final attack on the reasoning of the majority, the dissenting justices in *Boeing* argued that an interpretation of the "as damages" language that includes CERCLA response costs violates public policy.²²³ The dissent reasoned that Congress intended that the parties who financially benefit from the polluting activities should bear the clean-up costs.²²⁴ According to the dissent, allowing coverage permits polluters to avoid liability and to reap the financial rewards of their polluting activity, while the insurers bear the financial burden.²²⁵

This analysis, however, misinterpreted Congressional intent behind the enactment of CERCLA. The CERCLA legislative history contains nothing to suggest that Congress intended for polluters, to the exclusion of their insurers, to pay for clean-up costs.²²⁶ In fact, Congress intended that CERCLA's liability provisions should ensure that the victims of pollution are not left uncompensated for harm caused by hazardous waste pollution.²²⁷ Moreover, Congress enacted CERCLA's liability provisions to ensure that "innocent victims" harmed by hazardous waste pollution do not bear the costs of cleanup.²²⁸ Additionally, Congress intended to provide a remedy for victims of hazardous waste pollution who, in the absence of CERCLA's liability provisions, would have difficulty seeking redress through the court system.²²⁹ Indeed, actions seeking compensation for pollution-related injuries are cumbersome, time-consuming and expensive, making recovery for such damages difficult to obtain.²³⁰ Thus, while Congress intended that CERCLA accomplish the task of cleaning up environmental pollution, it did not specifically provide, nor intend, that polluters, rather than insurers, pay for the cleanup of hazardous waste sites.

In addition, the dissent fails to consider that there are other mechanisms within an insurance policy by which a pol-

or the purpose of the provisions in which the phrase is contained. *Id.* at 908, 546 P.2d at 1241.

223. *Boeing*, 113 Wash. 2d at 905, 784 P.2d at 525.

224. *Id.* at 906, 784 P.2d at 526.

225. *Id.*

226. S. RPT. NO. 848, 96th Cong., 2d Sess. 98, reprinted in SENATE COMM. ON ENV'T & PUB. WORKS, *Legislative History of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980*, 308, 320 97th Cong., 2d Sess. (1980).

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.* at 320.

luter may be held liable.²³¹ Manipulating state contract law to interpret the "as damages" clause in favor of insurers simply engenders litigation and confusion, particularly when there are more appropriate clauses under which coverage could be denied if such denial is appropriate.

VII. CONCLUSION

Through the establishment of Superfund, Congress intended to provide a mechanism to promote the cleanup of hazardous waste sites.²³² By providing a mechanism through which the government can require the cleanup of these sites—and the appropriations to finance these cleanups—Congress took a definitive step toward solving our nation's hazardous waste crisis. This crisis, however, has only grown since 1980 when CERCLA was enacted.

The government, through its own efforts, cannot solve this crisis: it has neither the resources nor the funds to effectively combat the ever-increasing amount of hazardous waste leaking into the environment. Engaging polluters in the clean-up process is the only effective means of combating this crisis. Washington courts have specifically recognized that effective hazardous waste cleanup must involve cooperation between the EPA and the parties responsible for the pollution.²³³ Accordingly, polluters should be given clear signals that they are, in fact, responsible for cleaning up contamination of pollution they generated.

Currently, however, this type of cooperation is nonexistent. Polluters and insurers are slow to clean up hazardous waste sites—preferring to wait until the extent of their liability has been determined through litigation.²³⁴ Thus, litigation over the currently unresolved "as damages" issue, in effect, discourages and delays voluntary cleanups while insurers seek a favorable judicial determination.²³⁵

A definitive judicial determination in favor of coverage for clean-up costs will promote voluntary cleanup. Businesses

231. See *supra* note 24.

232. See *supra* note 14.

233. *Queen City Farms v. Aetna Casualty & Sur. Co.*, No. 86-2-06236-0 (King County Super. Ct. Sept. 4, 1987), reported in Mealey's Litigation Reports—Insurance A-106, A-108 (Nov. 24, 1987).

234. *Id.*

235. *Intel Corp. v. Hartford Accident & Indem. Co.*, 692 F. Supp. 1171, 1193 (9th Cir. 1988).

purchase CGL policies in order to limit their liability for business-related damage. These policies should cover loss or damage caused by any event not explicitly excluded from coverage. Had the insurers intended to limit the term "damages" to strictly legal damages, the CGL policies should have included such an exclusion. However, because CGL policies do not limit coverage to legal damages, purchasers of these insurance policies should reasonably be able to expect coverage for all unanticipated liability arising from the activities of business.

Imputing a technical definition of damages years after a policy was negotiated is contrary to the fundamental principles of contract law. Moreover, the drafting history of CGL policies demonstrates that even though the policies do not explicitly define the term "damages," the insurers assumed that CGL policies provided coverage for clean-up costs.²³⁶ Because insurers did not expressly limit their liability, and, in fact, expected to cover CERCLA response costs, insurers should not, at this later date, be allowed to limit liability for costs that should be covered damages.²³⁷ Thus, coverage will effectively compensate for liabilities which both the insured and the insurer could have reasonably expected to be covered damages. Ultimately, providing coverage for CERCLA response costs will fulfill the basic purpose of insurance—which is to insure.²³⁸

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236. In *Shell Oil Co. v. Accident & Casualty Insurance Co. of Winterthur*, No. 27852, (San Mateo County, Cal. Super. Ct. July 13, 1988), the court considered testimony and documentary evidence which indicated that insurers did not intend the term "damages" to have a special or technical meaning within CGL policies. *Id.* at 79. *Shell Oil* is the only case wherein the court considered extrinsic evidence pertaining to the insurers' intent and understanding of the term "damages" within CGL policies. LATHROP, *supra* note 17, at 195. The court in *Shell Oil* relied on the "testimony of underwriters and drafters of the insurance provisions." *Id.* at 76.

237. In fact, the court in *Boeing* argued that the insurance industry can include exclusionary language and conditions in insurance policies. *Boeing Co. v. Aetna Casualty & Surety Co.*, 113 Wash. 2d 869, 887, 784 P.2d 507, 516 (1990).

238. *Safeco Ins. Co. of America v. Davis*, 44 Wash. App. 161, 164, 721 P.2d 550, 551 (1986).